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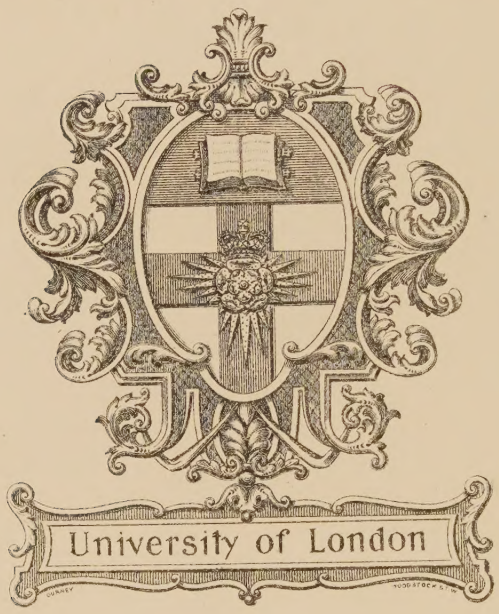

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1913.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

Probate Division.

COURTS OF PROBATE, DIVORCE, AND ADMIRALTY.

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL;

ALSO DECISIONS IN THE

ECCLESIASTICAL COURTS.

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OF

THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE.

1913.

Sir Samuel T. Evans, Knt., President.
Sir Henry Bargrave Deane, Knt.

JUDGES

OF

THE COURT OF APPEAL.

1913.

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MEMORANDUM.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION (ADMIRALTY).

The late Lord Gorell.

1913. April 23. This day, on the opening of the Court, the President (Sir Samuel Evans) and Mr. Justice Bargrave Deane, who were accompanied on the Bench by two of the Elder Brethren of the Trinity House, addressed a large gathering of members of the Probate, Divorce, and Admiralty Bars, on the occasion of the death of Lord Gorell on April 22.

The President said:—It is fitting that we should pause for a short space before beginning the work of this Division to-day in order to allow our memories to recall, and our thoughts to record, our tribute to the work and life of the eminent Judge who has just passed away.

Lord Gorell served the State in several capacities; but his long career as an advocate, Judge, and President in this Division links his name and fame with these Courts, and will always constitute an important part in their history. That career was long, strenuous, honourable, and, in the best sense, successful and useful. As President and Judge he interpreted the laws and administered justice here for seventeen years. To the work he brought the faculties of a trained legal intellect, and the qualities of an open, clear, robust, and fair mind. In the work he never spared himself. His thoroughness could not be surpassed. He had very eminent predecessors in his office, but he is entitled to a high place amongst them in respect of the first qualities of judgeship.

This is not the time to attempt an appreciation of his

achievements as a lawyer and jurist. That will come in due course from students of his patient labours, and of the long series of learned judgments with which he enriched the law, both in domestic, and in what may be regarded as international, questions. Few knew the technicalities of the law as he did; but these did not contract his vision. He regarded laws and their administration from aspects which were wide and full. Further, he had broad and enlightened views as to the reforms in our jurisprudence required to meet the needs of an advancing society. His Courts were models of what such Courts ought to be. In them he shewed learning, distinction, power of investigation, patience, urbanity, and genuine kindness. When he sat, as he often did, in the Court of Appeal, he dealt as ably with the various legal questions which came before him there as he did with those which belonged specially to the realm of law in which his work mainly lay. Ultimately he was called to a position in which he could serve in the highest appellate tribunal. The service could not be demanded of him, but he willingly rendered it. He might have chosen to avail himself of a leisured retirement, but that would have been foreign to his nature. He not only continued to act as a Judge in the House of Lords and in the Judicial Committee of the Privy Council, but he undertook at the call of the State, and in the public interest, laborious work on important Commissions, wholly unheeding and unmindful of the great strain which it imposed upon his health—a strain which probably hastened his end. To the last he kept on his armour. His motto was, "You can break me, but you cannot bend me." He remained unswerving in the performance of his duties, but his strength was at last broken.

My brother Judge, Mr. Justice Bargrave Deane, had the privilege of a longer and closer association with him than I had, of which he may speak; but I may be permitted to add that I had reason to know and to appreciate that no one was readier to give wise counsel, generous help, or kind encouragement than Lord Gorell was. To all of us, and to some of us more especially, his life offers an example which, if difficult to follow, is worthy of earnest emulation.

His mortal labours have ended. He has "looked forward into

the vague land." To such the end may come as a relief, but to those who were near, and who are left behind, pain and grief come and must be suffered. To them I wish respectfully to offer the deep sympathy which we all feel.

Mr. Justice Bargrave Deane said:—My Lord has spoken of the public character of our friend Lord Gorell. We who have worked here in this Court for many years knew him in his private character. We valued him for his charm of manner, his courtesy, and for his real friendship for everybody who practised before him. His life is an emblem of what he was. We all remember how for many years he worked in the chambers of that great lawyer J. C. Mathew, apparently without profit or reward for himself, till Mathew became a Judge in 1881. At once Barnes sprang into fame. A man who up to that time had been so retiring and hardly known, except as Mathew's pupil and friend, suddenly became the leading junior in big commercial causes. Immediately, almost, his success came. In seven short years he took silk, and four years later—in 1892—he was made a Judge. From that time onward we have known him as a Judge, and when he came among us as a Judge he came as a friend. At that time he and I were on the closest terms of affection and regard. His charm of manner, his pleasant voice, his genial smile endeared him to all of us. I do not believe he ever uttered a harsh word to anybody who came before him or was associated with him. That speaks volumes for a man who for seventeen years was a Judge. When Lord Gorell gave up the duties of President of this Division I did not lose my friend altogether, because I was constantly seeing him, and some of the happiest days I have spent were spent at his country place, where he put off the Judge and became the country gentleman. His death came as a great blow, and I deeply regret that I shall see his face no more.

On behalf of the Probate, Divorce, and Admiralty Bars, Mr. Laing, K.C., and Mr. Priestley, K.C., asked leave to associate themselves respectfully with the sentiments their Lordships had expressed.

ERRATA.

Page	*Line*	*For*	*Read*
29	The reference in note (1) *should read* VI. [not X.] iii. 20. 3.		
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The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1913, will be as follows :—

In the First Series,
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[1913] 1 K. B. [1913] 2 K. B. [1913] 3 K. B. [1913] P.

In the Third Series,
[1913] A. C.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Amstelstroom, The	68, n.
Atkins *v.* Atkins	211

B.

Blackledge *v.* Blackledge	9
Bourne *v.* Bourne	164
Brooking-Phillips *v.* Brooking-Phillips (C. A.)	80
Burmester *v.* Burmester	76

C.

Cap Blanco, The (C. A.)	130
Cavendish *v.* Cavendish	138
Close, Ely (Bishop) *v.*	184
Counsellor, The	70
Cowley *v.* Cowley	159

D.

de Montaigu *v.* de Montaigu	154
Devonshire (The) and The St. Winifred	13
Dickinson *v.* Dickinson	198

E.

	PAGE
Ely (Bishop) *v.* Close	184
Exeter (Archdeacon) *v.* Green	21

G.

Giannetti, Grant *v.*	137
Glenmorven, The	141
Grant *v.* Giannetti	137
Green, Exeter (Archdeacon) *v.*	21
Gullan *v.* Gullan	160

H.

H. M. S. Hawke and The Olympic (C. A.)	214
Harberton, The	149
Heathcote, In the Estate of	42

M.

McQuiban *v.* McQuiban	208

N.

N. *v.* N.	75
Nicolay Belozwetow, The	1

O.

PAGE

Okehampton, The 54
——————— (C. A.) 173
Olympic, The (C. A.) 92
——————— and H.M.S.
Hawke (C. A.) 214

R.

Roby, In the Estate of 6

S.

PAGE

St. Winifred (The) and The
Devonshire 13
Scott *v.* Scott 52
Stathatos *v.* Stathatos 46
Studley *v.* Studley (C. A.) 119

T.

Tempus, The 166

TABLE OF CASES CITED.

A.

		PAGE
A. B., In re	11 P. D. 56	190
Agius *v.* Great Western Colliery Company	[1899] 1 Q. B. 413	17
Albano, The	[1907] A. C. 193	266
Alice (The) and Princess Alice (The)	L. R. 2 P. C. 245	258
Amstelstroom, The	[1913] P. 68, n.	68
Andrews *v.* Ross	14 P. D. 15	138
Appleby *v.* Myers	L. R. 2 C. P. 651	144
Armytage *v.* Armytage	[1898] P. 178	48
Austin Friars Steamship Company *v.* Strack	[1905] 2 K. B. 315	97
Austrian Lloyd Steamship Company *v.* Gresham Life Assurance Society	[1903] 1 K. B. 249	135

B.

B. *v.* B.	[1901] P. 39	199
— *v.* L.	L. R. 1 P. & M. 639	199
Baggett *v.* Meux	1 Ph. 627	124
Bahia, The	Br. & L. 61	134
Barnett *v.* Howard	[1900] 2 Q. B. 784	122
Baumvoll Manufactur von Carl Scheibler *v.* Furness	[1893] A. C. 8	66
Beale *v.* Thompson	3 Bos. & P. 405	112
Belcher *v.* Capper	4 Man. & G. 502	66
Beneficed Clerk *v.* Lee	[1897] A. C. 226	189
Beynon, In the Estate of	[1901] P. 141	7
Birmingham and District Land Company *v.* London and North Western Railway Company	34 Ch. D. 261	19
Borough *v.* Collins	15 P. D. 81	190
Briggs *v.* Morgan	3 Phillim. 325	202
Brown *v.* Dimbleby	[1904] 1 K. B. 28	122
Bruce, In the Estate of	Unreported	8
Burder *v.* ——	3 Curt. 822	189
Byfoged Christensen (The) and William Frederick (The)	4 App. Cas. 669	270

C.

C. *v.* C.	27 Times L. R. 421	199
Cairn Line of Steamships, Ld. *v.* Trinity House Corporation	[1907] 1 K. B. 604; [1908] 1 K. B. 528	3
Campania, The	[1901] P. 289	71
Castleventry, The	*Shipping Gazette*, April 16, 1904	71

		PAGE
Cattle *v.* Stockton Waterworks Company	L. R. 10 Q. B. 453	66
Churchward *v.* Churchward	[1895] P. 7	52
Colvin *v.* Newberry & Benson	1 Cl. & F. 283	66
Commerce, The	3 W. Rob. 287	269
Constable's Case	5 Rep. 106a	97
Cory & Co. *v.* France, Fenwick & Co.	[1911] 1 K. B. 114	17
Crickitt *v.* Crickitt	[1902] P. 177	122

D.

D. *v.* A.	1 Rob. Ecc. 279	205
— *v.* F.	34 L. J. (P. & M.) 66	198
Devonshire (Owners of S.S.) *v.* Leslie (Owners of Barge)	[1912] A. C. 634	14
Devonshire (The) and St. Winifred (The)	[1912] P. 68	17
Dolphin *v.* Robins	7 H. L. C. 390	48
Doolan *v.* Midland Railway Company	2 App. Cas. 792	17
Dowling *v.* Dowling	[1898] P. 228	164
Dresel *v.* Ellis	[1905] 1 K. B. 574	123
Dunwich (Bailiffs of) *v.* Sterry	1 B. & Ad. 831	65

E.

Eden *v.* Weardale Iron and Coal Company	35 Ch. D. 287	123
Elderslie Steamship Company *v.* Borthwick	[1905] A. C. 93	17
Elizabeth, The	2 Dods. 403	99

F.

F. *v.* P.	27 Times L. R. 429	199
— *v.* —	75 L. T. 192	204
Fitzgerald *v.* Fitzgerald	L. R. 1 P. & M. 694	11
Fitzmaurice *v.* Hesketh	[1904] A. C. 266	189
Florance, The	16 Jur. 573	116
Free *v.* Burgoyne	2 Bli. (N.S.) 65.	190

G.

G. *v.* G.	[1912] P. 173	160
— *v.* —	L. R. 2 P. & M. 287	205
Glannibanta, The	1 P. D. 283	258
Gooch *v.* Gooch	[1893] P. 99	164
Gordon *v.* Harper	7 T. R. 9	177

H.

H. *v.* P.	L. R. 3 P. & M. 126	199
Hamlyn *v.* Wood	[1891] 2 Q. B. 488	19
Harrison *v.* Huddersfield Steamship Company	19 Times L. R. 386	177
Harrop *v.* Harrop	[1899] P. 61	122
Harrowing Steamship Company *v.* William Thomas & Son	29 Times L. R. 565	178
Herman *v.* Royal Exchange Shipping Company	1 Cab. & E. 413	177

		PAGE
Hero, The	[1911] P. 128; [1912] A. C. 300	235
Hope *v.* Hope	1 Sw. & Tr. 94	81

J.

Jersey (Dean) *v.* ——	3 Moo. P. C. 229	189

K.

Kate, The	[1899] P. 165	64
Kirby *v.* Kirby	2 Curt. Eccl. Rep. 214, n.	84
Kirchner & Co. v. Gruban	[1909] 1 Ch. 413	135
Kruger & Co. *v.* Moel Tryvan Ship Company	[1906] 2 K. B. 792; [1907] A. C. 272	19, 177

L.

Law *v.* Garrett	8 Ch. D. 26	135
Lee *v.* Flack	[1896] P. 138	190
Legge *v.* Boyd	14 L. J. (C.P.) 138	99
Le Sueur *v.* Le Sueur	1 P. D. 139	48
Liverpool, The	[1893] P. 154	144
Logan *v.* Bank of Scotland (No. 2)	[1906] 1 K. B. 141	135
Lord *v.* Price	L. R. 9 Ex. 54	177
Louise, The	18 Times L. R. 19	17
Lowe *v.* Lowe	[1899] P. 204	122

M.

M. *v.* H.	3 Sw. & Tr. 517	199
— *v.* M.	22 Times L. R. 719	199
Malley *v.* Malley	25 Times L. R. 662	53
Manchester Trust *v.* Furness, Withy & Co.	[1895] 2 Q. B. 282	66
Marechal Suchet, The	[1911] P. 1	144
Mary, The	[1897] A. C. 351	280
Merchant Prince, The	[1892] P. 9, 179	247
Midwinter *v.* Midwinter	[1892] P. 28	140
Millwall, The	[1905] P. 155	20
Moorcock, The	14 P. D. 64	19
Moore *v.* Moore	3 Moo. P. C. 84	85
—— *v.* Oxford (Bishop)	[1904] A. C. 283	186

N.

Nelson Line (Liverpool) *v.* James Nelson & Sons	[1908] A. C. 16	17
Neptune, The	1 Hagg. Adm. 227	116
Newton *v.* Newton	11 P. D. 11; [1896] P. 36	76, 78
Nicholl *v.* Ashton, Eldridge & Co.	[1901] 2 K. B. 126	97
Noakes *v.* Noakes	4 P. D. 60	76

O.

Oceano, The	3 P. D. 60	243
Ogden *v.* Ogden	[1908] P. 46	46, 154
O'Neil *v.* Armstrong, Mitchell & Co.	[1895] 2 Q. B. 70	144

P.

		PAGE
Pawley *v.* Pawley	[1905] 1 Ch. 593	124
Pekin, The	[1897] A. C. 532	243
Pelton Brothers *v.* Harrison	[1891] 2 Q. B. 422	123
Pickavance *v.* Pickavance	[1901] P. 60	12
Piéve Superiore, The	L. R. 5 P. C. 482	134
Pollard *v.* Wybourn	1 Hagg. Ecc. 725	200
Princess Alice (The) and Alice (The)	L. R. 2 P. C. 245	258
Proctor *v.* Proctor	2 Hagg. Cons. 292	87

R.

Racine, The	[1906] P. 273	63
Ranger, The	L. R. 4 P. C. 519	243
Reeves *v.* Capper	5 Bing. N. C. 136	177
Reg. *v.* Adams	22 Q. B. D. 66	191
Rex *v.* Forty-nine Casks of Brandy	3 Hagg. Adm. 257	99
—— *v.* Sir Ambrose Forth	Davys, 1	34
—— *v.* Sir A. Vaughan	Davys, 1	37
—— *v.* Two Casks of Tallow	3 Hagg. Adm. 294	99
Robertson *v.* Amazon Tug and Lighterage Company	7 Q. B. D. 598	147
Rochester (Bishop) *v.* Harris	[1893] P. 137	189
Rosalie, The	5 P. D. 245	269
Rose *v.* Rose	7 P. D. 225; 8 P. D. 98	165
Russell *v.* Russell	[1895] P. 315	80

S.

S. *v.* A.	3 P. D. 72	198
— *v.* S.	24 Times L. R. 253	199
St. Cloud, The	Br. & L. 4	134
Samuel *v.* West Hartlepool Steam Navigation Company	11 Com. Cas. 115	181
Sans Pareil, The	[1900] P. 267	235
Saunderson *v.* Clagget	1 P. Wms. 657	26
Scarsdale, The	[1907] A. C. 373	97
Scott *v.* Morley	20 Q. B. D. 120	122
Seaver *v.* Seaver	2 Sw. & Tr. 665	80
Sharpe *v.* Sharpe	[1909] P. 20	162
Shephard *v.* Payne	12 C. B. (N.S.) 414; 16 C. B. (N.S.) 132	25
Sickert *v.* Sickert	[1899] P. 278	11
Sidney *v.* Sidney	17 L. T. 9	78
Sievewright *v.* Allen	[1906] 2 K. B. 81	97
Simpson *v.* Thomson	3 App. Cas. 279	64
Sir John Jackson, Ld. *v.* Blanche (Owners of S.S.)	[1908] A. C. 126	66
Slader *v.* Smalbrooke	1 Lev. 138	190
Société Anonyme de Remorquage à Hélice *v.* Bennetts	16 Com. Cas. 24	64
Stathatos *v.* Stathatos	[1913] P. 46	154
Stokes *v.* Stokes	[1911] P. 195	11
Suevic, The	[1908] P. 154, 292	100
Sweet *v.* Young	[1902] P. 37	189

T.

		PAGE
T. *v.* M.	L. R. 1 P. & M. 31	200
Tagart, Beaton & Co. *v.* James Fisher & Sons	[1903] 1 K. B. 391	178
Taylor *v.* Caldwell	3 B. & S. 826	97
Thyatira, The	8 P. D. 155	64
Tillmanns & Co. *v.* S.S. Knutsford	[1908] 2 K. B. 385	181
Tindle *v.* Davison	7 Asp. M. L. C. 169	97
Tongariro, The	[1912] P. 297	3
Townsend *v.* Thorpe	2 Ld. Raym. 1507	190
Trinity House (Masters of) *v.* Clark	4 M. & S. 288	66
Tullett *v.* Armstrong	4 My. & Cr. 377	124
Turner *v.* Hagi Goolam Mahomed Azam	[1904] A. C. 826	177

V.

Velocity, The	L. R. 3 P. C. 44	215
Victor *v.* Victor	[1912] 1 K. B. 247	210
Vindomora, The	[1891] A. C. 1	71

W.

W. *v.* S.	[1905] P. 231	199
— *v.* W.	[1912] P. 78	199
Wade *v.* Wade	[1903] P. 16	123
Waikato (Owners of Wool Cargo on S.S.) *v.* New Zealand Shipping Company	8 Asp. M. L. C. 442	17
Warrior, The	Lush. 476	116
Waterhouse *v.* Waterhouse	[1893] P. 284	140
Wehner *v.* Dene Steam Shipping Company	[1905] 2 K. B. 92	66, 181
Weir *v.* Union Steamship Company	[1900] A. C. 525	66
West Cock, The	[1911] P. 208	144
William Frederick (The) and Byfoged Christensen (The)	4 App. Cas. 669	270
Wilson *v.* Glossop	19 Q. B. D. 379	84
——— *v.* Wilson	L. R. 2 P. & M. 435	157
Winkfield, The	[1902] P. 42	65
Woodhorn, The	92 L. T. Journ. 113	97

CASES

DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

THE NICOLAY BELOZWETOW.

1912

Oct. 25, 26; *Nov.* 11.

Admiralty—Ship—Collision—Compulsory Pilotage—Exemption—Putting into the Humber for "Stores" only—Bunker Coal—(2 & 3 *Will.* 4, *c. cv.* (*Local Act*), *s.* 24.

The defendants' steamship, whilst on a voyage from Great Yarmouth to a Russian port with a cargo of herrings, put into the Humber for the purpose of replenishing her stock of bunker coal, and came into collision with the plaintiffs' trawler. Both vessels were found to blame. The defendants set up a plea of compulsory pilotage :—

Held by the President (Sir Samuel Evans), that the defendants could not escape liability by reason of their vessel being in charge of a duly licensed pilot in a compulsory pilotage district, as the coals were "stores" within the meaning of s. 24 of the local Act 2 & 3 Will. 4, c. cv., by which "any ship or vessel putting into the river Humber for the purpose of shelter or of obtaining stores or provisions only" is exempt from compulsory pilotage.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the owners of the steam trawler *Scarborough*.

1912

THE NICOLAY BELOZWETOW.

The defendants, and counter-claimants, were the owners of the Russian steamship *Nicolay Belozwetow* and her freight.

The case is reported on the question whether pilotage was compulsory on the *Nicolay Belozwetow*, she having put into the Humber for the purpose of replenishing her stock of bunker coal. The material words of the section (24) of the local Act (2 & 3 Will. 4, c. cv.), upon which the question turned, are set out in the judgment.

On November 29, 1911, about 11 A.M., the weather being foggy, the wind calm, and the tide about high water, the steam trawler *Scarborough*, of the port of Grimsby, of 161 tons gross register, and manned by a crew of nine hands, was in the river Humber a little below the Fish Dock basin, having just left the Fish Dock piers, bound on a ten days' fishing voyage, when she came into collision with the *Nicolay Belozwetow*, a Russian screw steamship of 1943 tons gross register, in tow of the steam-tug *Spurn*, and in charge of a duly licensed pilot. She was bound to the Royal Dock basin at Grimsby, in the course of a voyage from Great Yarmouth to a Russian port with a cargo of herrings, and had put into the Humber for the purpose of replenishing her stock of bunker coal. Both vessels sustained damage, and the *Scarborough* had to put back to Grimsby for repairs.

The plaintiffs, the owners of the *Scarborough*, issued a writ in an action of damage on November 30, 1911, and by their statement of claim charged the Russian vessel with bad look-out, neglecting to go at a moderate speed, not stopping, not sounding the appropriate fog signals, and with failure to comply with arts. 15, 16, and 29 of the regulations for preventing collisions at sea.

The defendants, the owners of the Russian vessel, by their defence and counter-claim, made similar charges against the trawler, and, in addition, they pleaded that "if there was any negligence in the navigation of the *Nicolay Belozwetow*, which is denied, the same was solely that of the pilot who was in charge of the vessel by compulsion of law, and whose orders were all duly obeyed."

On October 25 and 26, 1912, the case was tried by the President (Sir Samuel Evans), assisted by two of the Elder Brethren of the Trinity House, and in the result the *Scarborough*

and the *Nicolay Belozwetow* were both found to blame for improper navigation in a dense fog, the liability to make good the damage being, therefore, apportioned equally. (1)

The question of compulsory pilotage was reserved.

Bateson, K.C., and *D. Stephens*, for the plaintiffs, the owners of the *Scarborough*.

Laing, K.C., and *C. Robertson Dunlop*, for the defendants, and counter-claimants, the owners of the *Nicolay Belozwetow*.

The arguments of counsel, in respect of the plea of compulsory pilotage, fully appear from the judgment. The cases of *The Tongariro* (2) and *Cairn Line of Steamships, Ld.* v. *Trinity House Corporation* (3) were referred to.

Cur. adv. vult.

1912. Nov. 11. THE PRESIDENT (SIR SAMUEL EVANS). The decision upon the facts in this case which I gave upon the hearing was that both the steam trawler *Scarborough* (the plaintiffs' vessel) and the steamship *Nicolay Belozwetow* (the defendants' vessel) were in fault and to blame for the collision. Thereupon the defendants claimed judgment on the ground that their vessel was in charge of a duly licensed pilot in a compulsory pilotage district, to wit, in the river Humber, and that the fault attributable to their vessel was solely that of the pilot.

Upon the case as proved, and by the admission of the plaintiffs' counsel, it must be taken that the defendants' vessel was in charge of a duly licensed pilot, and that, so far as the defendants' vessel was concerned, the fault was solely that of the pilot. Plaintiffs' counsel, however, submitted that the defence of compulsory pilotage did not avail the defendants, on the ground that the pilotage in the circumstances was not compulsory, because the case came within one of the exemptions contained in s. 24 of 2 & 3 Will. 4, c. cv. (local Act), which regulates pilotage in the river Humber. That exemption is the one which makes it

(1) The provisions of the Maritime Conventions Act, as to the degree in which each vessel was in fault, did not apply, proceedings having been taken before the passing thereof (December 16, 1911).

(2) [1912] P. 297.

(3) [1907] 1 K. B. 604; [1908] 1 K. B. 528.

1912

THE NICOLAY BELO-ZWETOW.

The President.

non-obligatory for a master of a vessel putting into the river Humber "for the purpose of obtaining stores only" to employ a pilot.

The fact was that the defendants' vessel, which was on a voyage from Great Yarmouth to some Russian port with a cargo of herrings, had put into the Humber, and was proceeding to Grimsby for the purpose only of obtaining bunker coal for the vessel's use on the voyage, when the collision occurred. The defendants' answer to the plaintiffs' submission was twofold: (1.) that the provision for compulsory pilotage in the port of Grimsby was not governed by 2 & 3 Will. 4, c. cv., but by 12 & 13 Vict. c. lxxxi. (local Act), and that the latter statute contained no exemption in favour of vessels "putting in for stores only"; and (2.) that even if the former statute, and exemption therein contained, applied, bunker coals are not "stores" within that exemption, and that, therefore, the defendants' vessel did not come within the exemption, and was bound by law to take a pilot.

Grimsby Docks, and the place where the collision happened, are, of course, in the river Humber. The 12 & 13 Vict. c. lxxxi. contained certain provisions relating to pilots and pilotage rates which were enacted for the port of Grimsby when the docks were constructed; but on reference to the two Acts of Parliament it is quite clear that the provisions in the later Act are only subsidiary to those in the former, and the obligations to employ a pilot, and the penalties for not employing a pilot, apply to Grimsby Docks as they did to the Grimsby Roads before 12 & 13 Vict. c. lxxxi. was passed.

I therefore must rule against the first contention of the defendants, and decide that the place where the vessels collided was within the compulsory pilotage area in which the provisions of 2 & 3 Will. 4, c. cv., are in force; and that therefore the exemption in favour of vessels "putting in for stores only" applies.

The question that remains is whether bunker coals are "stores" within the meaning of s. 24 of this Act, so as to bring the defendants' vessel within the exemption, and so render the employment of a pilot optional and non-compulsory. The collocation of the word "stores" in the section is as follows: "Any ship or vessel putting into the river Humber for the purpose of shelter,

1912

THE NICOLAY BELO-ZWETOW.

The President.

or of obtaining stores or provisions only." There does not appear to be any logical reason for the exemption arising from considerations of avoiding perilous possibilities, or of ensuring safe navigation. The risks of local dangers of navigation are the same whether a vessel puts into the Humber for shelter or for articles which are undoubtedly "stores," such as anchors, cables, or sails for the vessel's use, or whether she proceeds thither for the purpose of receiving or discharging cargo. If speculation as to the reason for the exemption is permitted, the basis probably is that a vessel should be exempt if she puts in for something which is not directly freight-earning, like cargo. Of course, masters of vessels, though not compelled to take a pilot, can do so, if the Humber be strange waters to them, or if for any reason they think it desirable. Sails, oils, ropes, &c., procured for the use of a vessel and required to enable her to navigate, are undoubtedly "stores" within the meaning of the section. Why should bunker coal procured for the like use and required for the like purpose not be "stores"? The necessary bunker coals in the case of a steamship must be provided before the ship can be seaworthy, and they have, of course, been held to be "necessaries." They are required for her navigation, just as sails are essential for a sailing ship. Some steamships carry a little sailing tackle as well as bunker coals. It would be strange if the former were included in "stores" and the latter not. It does not help much, perhaps, to look at other Acts of Parliament in which the word "stores" has been used in order to decide what it means in the section now under consideration, but it may be observed that in the Merchant Shipping Acts the phrase "stores or cargo" has often been used as in contradistinction [cf. the Merchant Shipping Act, 1854, s. 243 (now repealed), and the Merchant Shipping Act, 1894, ss. 225 and 376]. In seafaring language "stores" may be ambiguous, but, on the whole, having regard to the words of the section and to the juxtaposition of the words "stores or provisions," I am of opinion that they mean some things which are not cargo, and that it gives the word "stores" a natural and reasonable construction in the section to say that it comprises bunker coal. Giving it this meaning, the result is that the exemption applies, and that it was not

1912

THE NICOLAY BELO-ZWETOW.

The President.

compulsory upon the master of the defendants' vessel to take a pilot in putting into the Humber for the purpose only of obtaining bunker coal at Grimsby.

The defence of compulsory pilotage, therefore, fails, and both vessels being equally to blame, I give judgment accordingly, and order the usual reference to ascertain the amount of damage sustained.

Solicitors for plaintiffs, the owners of the *Scarborough*: *Pritchard & Sons, for A. M. Jackson & Co., Hull.*

Solicitors for defendants, the owners of the *Nicolay Belozwetow*: *Stokes & Stokes.*

T: L. M.

1912

Nov. 25.

IN THE ESTATE OF ALBERT WALLACE ROBY. IN THE ESTATE OF AGNES A. A. T. ROBY.

Probate—Practice—Two Persons dying together—Survivorship—Husband and Wife—Wills—Probate, or Administration with Will annexed—Form of Oath to lead Grants.

Where there is no evidence, or where it is clear that there is not sufficient evidence, of survivorship, in cases of husband and wife dying at the same time, the practice in future will be to apply in the Principal Probate Registry, and not, as heretofore, by motion to the Court, for grants of probate or administration, and for leave to vary the usual form of oath.

Where, however, there is any doubt as to survivorship, the registrar will refer the case to the Court, to be dealt with on motion.

MOTIONS for grants and for leave to vary the usual form of oath, in the case of a husband and wife commorientes.

Albert Wallace Roby and Agnes Alice Ann Teresa Roby, his wife, were passengers in one and the same compartment of a train and were both killed in a railway accident at Ditton, on the London and North Western Railway, on September 17, 1912.

A post-mortem examination of the remains was made by four doctors, three of whom were appointed by relatives of the husband, and one by relatives of the wife.

These four medical men arrived at the following "General Conclusions:—Assuming that the injuries to the man and woman

occurred simultaneously, we are of opinion that it is impossible for the woman to have survived the man. On the other hand, it is possible that the man may have survived the woman for a very short time, but we cannot say with certainty whether he survived her or not."

Thomas Borrows, a brother and one of the next of kin of the wife, moved for a grant of administration (with the will annexed), in respect of her estate, and for leave to alter the usual form of oath by swearing that she and her husband both died on September 17, 1912, and that after due inquiries there was no reason to believe that either survived the other.

Helen Elizabeth Roby and William Henry Roby, the surviving executrix and executor under the husband's will, applied for probate thereof, and also for leave to vary the usual form of oath, if, upon the facts, the Court should be of opinion that there was no evidence, or not sufficient evidence, of survivorship.

It appeared, from the affidavits and documents before the Court on the motions, that on May 16, 1912, the husband and wife each made and duly executed a will.

The wife, whose estate was comparatively small, by her will left everything she had power to dispose of to her husband absolutely and appointed him sole executor.

The husband, whose estate was considerable, appointed his wife and Helen Elizabeth Roby and William Henry Roby executrices and executor of his will, and gave his wife a legacy of 500*l.* absolutely and a life interest in the whole of his residuary estate, with remainders over on certain trusts specified.

BARGRAVE DEANE J. I am informed by the registrar that these grants could have been obtained in the Principal Registry without coming to the Court.

Durley Grazebrook, for the applicants. The practice approved by Lord Gorell in the case of *Beynon, deceased* (1), which has been followed repeatedly since that time, has been strictly adhered to in the present motions. A practice of such long standing, if changed at all, should only be altered by a formal direction of

(1) [1901] P. 141.

1912

ROBY, IN THE ESTATE OF.

the Court. The change of practice suggested by the registrar must be of very recent origin. Three separate instances of husband and wife commorientes, dealt with by this Court in or since 1910, on motion, precisely upon the lines of the practice in *Beynon's Case* (1), can be cited. In one of these cases (2) the will of the wife was almost identical with the wife's will in the present case. In none of these cases was any exception taken by the Court registrar, on lodging the papers, or by the presiding judge, when the motion came before the Court, that the practice of applying by motion was unnecessary. Moreover, it is doubtful whether the registrar has power to vary the usual form of oath prescribed by the Probate Rules.

BARGRAVE DEANE J. I make the order in each of these motions, as asked. I wish to state, however, that in future I shall not deal with this class of case on motion, as heretofore. In a perfectly clear case like this, there is no reason that I can see for incurring the expense of a motion.

Application should be made in the Principal Probate Registry in the first instance, and, in case of any doubt as to survivorship, the registrar will refer the matter to the Court, to be dealt with on motion.

Solicitors for the husband's representatives: *Chester, Broome & Griffithes, for W. Tyrer & Co., Prescot.*

Solicitors for the wife's next of kin: *Maples, Teesdale & Co., for Oppenheim & Son, St. Helen's, Lancashire.*

(1) [1901] P. 141.

(2) *In the Estate of Michael Bruce, deceased; In the Estate of Gertrude Maud Bruce, deceased* (unreported), March, 1910.

H. D. G.

[DIVISIONAL COURT.]

1912
Dec. 4.

BLACKLEDGE *v.* BLACKLEDGE.

Divorce—Practice—Desertion—Appeal from Justices—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39)—*Second Summons—Res Judicata—Wife's Costs.*

A wife, who was married in 1908, left her husband on February 20, 1910, after which they never cohabited. In April, 1910, a summons, which had been taken out by the wife in March, on the ground that her husband had deserted her on February 20, 1910, was dismissed.

A fortnight after the dismissal of that summons, the husband's solicitor received a letter from the wife's then solicitors, making accusations against the husband in reference to matters prior to the separation (which were said to have been since discovered by the wife), and asking whether the husband would agree to make arrangements for his wife's support, and hinting at proceedings in the Divorce Court. The husband's solicitor answered, in effect, that, in consequence of the statements made, he was not prepared to enter into any arrangement.

No proceedings were taken in the Divorce Court, and no further step was taken until October 8, 1912, when a second summons at the instance of the wife was issued, the ground of complaint being alleged desertion by the husband, but without specifying a date.

This second summons came before a bench of nine justices in another town, and they, on October 14, 1912, after overruling an objection that the matter was res judicata, and after refusing an application for an adjournment to call rebutting evidence, found the cause of complaint proved, and ordered the husband to pay 10*s.* a week for the maintenance of his wife, together with a sum for costs :—

Held, on appeal, that the order was wrong and must be rescinded; that the objection which the justices had overruled was good; that the matter was res judicata; that there was, neither in fact nor in law, any desertion of the wife by the husband; and, upon the question of costs, that the wife must bear her own, both in the Divisional Court and in the Court below.

This was an appeal from justices of the county borough of Blackpool against an order under the Summary Jurisdiction (Married Women) Act, 1895, made on the 14th day of October, 1912, whereby the husband (appellant) was found guilty of desertion, and was ordered to pay 10*s.* per week maintenance and 4*l.* 3*s.* 6*d.* costs.

The grounds of appeal were :—

(1.) That the cause of complaint upon which the said order was made was res judicata.

1912

BLACKLEDGE v. BLACK-LEDGE.

(2.) That there was no desertion.

(3.) That fresh evidence on the part of the respondent was improperly admitted contrary to the justice of the case.

(4.) That such fresh evidence having been admitted, an adjournment to enable the appellant to deal with the same by calling rebutting evidence was wrongfully refused him.

The facts shortly were as follows:—

The parties were married on August 6, 1908, and after the marriage they lived together down to February 20, 1910, when the wife left her husband, and they never lived together after that date.

On March 14, 1910, the wife issued a summons against her husband under the Summary Jurisdiction (Married Women) Act, 1895, alleging that he had deserted her on February 20, 1910, and that summons was heard by the bench of magistrates at Preston on March 19, 1910, and was adjourned till April 18, 1910, when it was dismissed.

On May 3, 1910, a letter was received by the husband's solicitor from the wife's then solicitors making accusations against the husband in reference to matters prior to February 20, 1910, and asking whether he would agree to make arrangements for his wife's support, and hinting at proceedings in the Divorce Court.

On May 13, 1910, the husband answered that letter saying that in consequence of the statements therein contained he was not prepared to enter into any arrangement.

No proceedings were taken in the Divorce Court, neither was anything done until October 8, 1912, when a summons was issued at Blackpool, also on the ground of alleged desertion, but no date was given therein for the alleged desertion. That summons was heard by the bench of magistrates at Blackpool on October 14, 1912, when the wife again gave evidence and dated her husband's desertion as on February 20, 1910, and the Bench found the cause of complaint proved, and ordered the husband to pay 10*s.* a week for maintenance and 4*l.* 3*s.* 6*d.* costs.

Objection was taken on the ground that the matter was res judicata, but the magistrates overruled the objection.

The magistrates also refused to allow the case to be adjourned to allow rebutting evidence to be called on behalf of the husband.

Priestley, K.C. (*R. M. Middleton* with him), for the appellant. The subject-matter of the second summons of October 14, 1912, is res judicata: *Stokes* v. *Stokes.* (1)

Bayford, for the respondent. The desertion dates from the time when the husband refused to do anything for his wife, namely, May 13, 1910. Where husband and wife are living apart from one another facts may subsequently arise which cause desertion to commence at some date subsequent to the separation: *Sickert* v. *Sickert.* (2)

[SIR SAMUEL EVANS, PRESIDENT. That case was quite different; there the wife was driven from the home by the conduct of the husband.]

Priestley, K.C., in reply. If the case were sent back the husband would never get justice in the Court below after all that has happened. The matters now sought to be raised would be far better dealt with by a judge of this Division. *Fitzgerald* v. *Fitzgerald* (3), which has been good law for a number of years, laid down that the refusal by either at the request of the other to resume conjugal relations does not constitute the offence of desertion, where the state of cohabitation has already ceased to exist.

The grounds of the appeal are so clear that the husband must insist upon his rights.

SIR SAMUEL EVANS, PRESIDENT. During the arguments we offered to send the case back to be dealt with in the Court below. But the appellant is quite within his rights in insisting that the case shall be disposed of here. In my opinion the point as to the matter being res judicata is covered by the decision in *Stokes* v. *Stokes.* (1) Furthermore I am clearly of opinion that there has been no desertion at all on the part of the husband. The wife had left him, and the state of cohabitation which had existed down to February 20, 1910, had been brought to an end on that

(1) [1911] P. 195. (2) [1899] P. 278, at p. 284.
(3) (1869) L. R. 1 P. & M. 694.

1912

BLACKLEDGE v. BLACK-LEDGE.

The President.

date, and by her own act. She now contends that although she separated from her husband voluntarily, yet, because she found out something afterwards, as she says, she is entitled to say at a later date: "I will not return to him, I will ask him to maintain me on the footing that I need not return to him, and, because he refuses to maintain me, I am entitled to allege that he has deserted me."

In my opinion that is not desertion in law.

This appeal therefore succeeds, and the order of the justices must be quashed.

BARGRAVE DEANE J. I am of the same opinion. The question of desertion was properly threshed out on the first occasion. It was then suggested that the husband was the real cause of the desertion, and the wife then said that she left him. Now she seeks to impose upon him something quite different, which she says she has found out since. It is not open to a wife to allege desertion in that way. If she has found out something since she left him, it is open to her to bring a suit in this Division.

Priestley, K.C., on the question of costs. In *Stokes* v. *Stokes* (1) the amount in Court, which was the same as in the present case, namely, 15*l.*, was ordered to be handed out to the husband. This is a second attempt by the wife, who has left her husband and child, and who has been able to live with her relations for over two years without any support from her husband. It is hard that he should be obliged to come here without any chance of being able to get his costs when he has succeeded. In *Pickavance* v. *Pickavance* (2) it was said that, if the husband had taken the point in the Court below upon which his appeal ultimately succeeded, the appeal might have been avoided. Here the point was taken in the Court below, and the appeal could not be avoided. The husband was condemned in the costs of the wife in the Court below, but he did not actually pay those costs pending the hearing of this appeal.

SIR SAMUEL EVANS, PRESIDENT. The wife must bear her own

(1) [1911] P. 195. (2) [1901] P. 60.

costs both here and in the Court below. The 15*l.* in Court must be handed out to the husband.

1912

BLACKLEDGE v. BLACKLEDGE.

Solicitors for appellant (husband): *Chester, Broome & Griffithes, for George Oakey, Preston.*

Solicitors for respondent (wife): *Indermaur & Brown, for C. W. Callis, Blackpool.*

H. D. G.

THE DEVONSHIRE AND ST. WINIFRED.

1912

Nov. 6, 19.

Admiralty—Collision—Towage—Damage to cargo—Indemnity claimed from Third Party—Construction of Contract—Implied Term.

A laden barge whilst in tow of a tug was sunk in the Mersey in a collision with a steamship, and the owners of the lost cargo commenced an action of damage against the steamship and the tug. The tug owners brought in the owners of the barge as third parties, and, in respect of any sum to which they (the tug owners) might be liable to the cargo owners, claimed a declaration that they were entitled to be indemnified by the barge owners under the terms of a "towage requisition" by which the tug owners (the Manchester Ship Canal Company) were "not to be responsible or liable for damage or injury to any ship vessel or craft, or the persons or goods on board any ship vessel or craft, of which the company may undertake the towage or docking in the river Mersey, the Manchester Ship Canal and the Bridgewater Canals, or which may be piloted by any of their servants to or from any place in the river Mersey, the said Ship Canal and the said Bridgewater Canals, or for any loss sustained or liability incurred by any one by reason of such damage or injury, or for any loss or liability incurred in consequence of any such ship, vessel, or craft colliding with or otherwise damaging any other vessel or thing, or for any loss or liability of any kind whatsoever arising from the towing, docking or piloting whatever may be the cause or causes of such damage, injury, loss or liability, or under whatever circumstances such damage, injury, loss or liability may have happened or accrued, even though arising from or occasioned by the act, omission, incapacity, negligence or default, whether wilful or not, of the company's servants or agents or any other persons, or any defect, imperfection, or insufficiency of power in or any delay, stoppage or slackness of speed of any tug or vessel, her machinery or equipment engaged in towing or docking any ship, vessel or craft, whether such defect, imperfection or insufficiency of power be in existence at the beginning of or during the said towing or docking."

1912

THE DEVONSHIRE AND ST. WINIFRED.

On the hearing of the issue as between the tug owners and the barge owners:—

Held by the President (Sir Samuel Evans), that the third parties, the owners of the barge, were entitled to be dismissed from the action with costs, as no such liability by the third parties, namely, the owners of the barge, to indemnify the owners of the tug, could be implied from the terms of the towage requisition.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were Petrococchino Brothers and Edwin Butterworth & Co., the owners of the cargo on board the barge *Leslie*.

The defendants were the owners of the steamship *Devonshire*, and the Manchester Ship Canal Company the owners of the steam tug *St. Winifred*.

The third parties were the Manchester Barging Company, Limited, the owners of the barge *Leslie*.

The case is reported on the question whether, under the "towage requisition" (set out below), the third parties (the Manchester Barging Company, Limited), owners of the barge *Leslie*, could be called upon to indemnify the defendants, the owners of the steam tug *St. Winifred*, against a liability for the damage and loss sustained by the plaintiffs, the owners of the cargo on board the barge *Leslie*.

On February 4, 1911, a collision occurred in the river Mersey between the screw steamship *Devonshire*, and the barge *Leslie* in tow of the steam tug *St. Winifred*, whereby the *Leslie* was sunk and her cargo lost.

In an action of damage brought by the owners of the barge *Leslie* against the owners of the *Devonshire*, the steamship and the steam tug *St. Winifred* were both found to blame for the sinking of the barge, and the *Devonshire* (as one of two joint tortfeasors) was held liable for the whole of the loss sustained by the owners of the barge and by her master and mate suing for their lost effects. (1)

On March 23, 1911, in an action of damage brought by the owners of the cargo on board the barge *Leslie* against the owners of the steamship *Devonshire*, and the owners of the steam tug *St. Winifred*, the tug owners addressed to the

(1) *S.S. Devonshire (Owners)* v. *Barge Leslie (Owners)* [1912] A.C. 634.

Manchester Barging Company, Limited, as owners of the barge *Leslie*, and filed in the Liverpool District Registry, a notice stating that "The defendants the Manchester Ship Canal Company, the owners of the *St. Winifred*, claim to be indemnified by you against liability in respect of the plaintiffs' claim in this action and in respect of any costs which the said defendants may incur or be ordered to pay on the ground that the tug *St. Winifred* was at the time of the collision the subject of this action performing the said towage services subject to special conditions of towage entered into between the said Manchester Ship Canal Company and the said Manchester Barging Company, Limited, and take notice that if you wish to dispute the plaintiffs' claim in this action as against the defendants, the owners of the *St. Winifred*, or your liability to the said defendants, you must cause an appearance to be entered for you within eight days after service of this notice."

On September 20, 1911, the defendants, the Manchester Ship Canal Company, as the owners of the *St. Winifred*, delivered their statement of claim against the third parties, the Manchester Barging Company, Limited, the owners of the barge *Leslie*, in which, after referring to the "towage requisition" (set out below), they stated that the collision between the steamship *Devonshire* and the barge *Leslie*, and the loss thereby sustained by the plaintiffs in the action (the cargo owners) "were caused by the joint negligence of those in charge of the *St. Winifred* (these defendants' servants or agents) and those in charge of the *Devonshire* and these defendants have in consequence thereof become liable to the plaintiffs for the loss so sustained by them. The total loss caused to the plaintiffs was 1973*l.* 17*s.* 2*d.*, whereof they have recovered from the owners of the *Devonshire* 1092*l.* 16*s.* 4*d.* For the balance, viz., 881*l.* 0*s.* 10*d.*, together with interest at 4 per cent., making a total of 937*l.* 4*s.* 8*d.*, these defendants became liable to the plaintiffs and paid such sum to them," and they claimed a declaration that they were entitled to be indemnified by the third parties against liability for the sum of 937*l.* 4*s.* 8*d.* or any part thereof and against their costs of defending this action, together with the costs of the third-party proceedings.

1912

THE DEVONSHIRE AND ST. WINIFRED.

The towage requisition (above referred to), dated July 22, 1907, ran as follows:—

"To the Manchester Ship Canal Company
(Bridgewater Department).

"We request that you will tow on the river Mersey and/or the Manchester Ship Canal and/or the Bridgewater Canals from time to time our vessels, or any vessels hired or loaded on our account, without requiring such vessels to be specially booked at your respective offices wherever the vessels may be taken in tow, and we agree that the towage is to be undertaken on your usual terms and following conditions, viz.:—

"The company are not to be responsible or liable for damage or injury to any ship vessel or craft or the persons or goods on board any ship vessel or craft, of which the company may undertake the towage or docking in the river Mersey, the Manchester Ship Canal and the Bridgewater Canals or which may be piloted by any of their servants to or from any place in the river Mersey, the said Ship Canal and the said Bridgewater Canals or for any loss sustained or liability incurred by any one by reason of such damage or injury or for any loss or liability incurred in consequence of any such ship, vessel, or craft colliding with or otherwise damaging any other vessel or thing or for any loss or liability of any kind whatsoever arising from the towing, docking or piloting whatever may be the cause or causes of such damage, injury, loss or liability, or under whatever circumstances such damage, injury, loss or liability may have happened or accrued even though arising from or occasioned by the act, omission, incapacity, negligence or default, whether wilful or not, of the company's servants or agents or any other persons or any defect, imperfection or insufficiency of power in or any delay, stoppage or slackness of speed of any tug or vessel her machinery or equipment engaged in towing or docking any ship vessel or craft whether such defect, imperfection or insufficiency of power be in existence at the beginning of or during the said towing or docking.

per pro Manchester Barging Co. Ltd.
"(Sgd.) Frank Clarke."

1912

THE DEVONSHIRE AND ST. WINIFRED.

On January 16, 1912, judgment was given, in the action between the cargo owners and the owners of the *Devonshire* and the *St. Winifred*, in accordance with the decision in *The Devonshire* (1), against both the owners of the *Devonshire* and the owners of the *St. Winifred* for the full amount of the damage sustained by the cargo owners.

On November 6, 1912, the issue between the tug owners and the barge owners was tried, the owners of the steamship *Devonshire* not being represented.

Laing, K.C., and *W. Norman Raeburn*, for the defendants, the Manchester Ship Canal Company, owners of the steam tug *St. Winifred*.

Bateson, K.C., and *D. Stephens*, for the third parties, the Manchester Barging Company, Limited, owners of the barge *Leslie*.

The arguments of counsel, on the question of indemnity, sufficiently appear from the judgment. In addition to the cases mentioned therein the following were referred to:—*Cory & Son* v. *France, Fenwick & Co.* (2); *Nelson Line* (*Liverpool*) v. *James Nelson & Sons* (3); *Elderslie Steamship Co.* v. *Borthwick* (4); *The Louise* (5); *Owners of Wool Cargo on S.S. Waikato* v. *New Zealand Shipping Co.* (6); *Agius* v. *Great Western Colliery Co.* (7); *Doolan* v. *Midland Ry. Co.* (8)

Cur. adv. vult.

1912. Nov. 19. THE PRESIDENT (SIR SAMUEL EVANS). The question arising for decision under the third-party procedure in this case is: whether under a contract of towage between the Manchester Ship Canal Company—tug owners—and the Manchester Barging Company, Limited,—barge owners—the former (hereinafter called the "tug owners") are entitled to an indemnity from the latter (hereinafter called the "barge owners") from and against a judgment obtained against the

(1) See *The Devonshire and St. Winifred* [1912] P. 68.
(2) [1911] 1 K. B. 114, at p. 135.
(3) [1908] A. C. 16.
(4) [1905] A. C. 93.
(5) (1901) 18 Times L. R. 19.
(6) (1898) 8 Asp. M. L. C. 442.
(7) [1899] 1 Q. B. 413.
(8) (1877) 2 App. Cas. 792.

1912

THE DEVONSHIRE AND ST. WINIFRED.

The President.

tug owners by the owners of cargo carried upon a barge belonging to the barge owners for loss occasioned by the negligence of the tug owners.

The facts arise out of a collision in the Mersey on February 4, 1911. The tug owners' tug *St. Winifred* had the barge owners' barge *Leslie* in tow. In the course of the towing the *Leslie* collided with a steamship, the *Devonshire*. This caused damage to the *Leslie* and to her cargo. The collision and damage were due to the negligence of those responsible for the navigation of the tug *St. Winifred* and of the steamship, the *Devonshire*. The *Leslie* may be described shortly as the "innocent barge in tow." Her owners recovered judgment against the owners of the steamship *Devonshire*. (1) Subsequently, the owners of the cargo on board the barge *Leslie* (the plaintiffs in the present action, in which the barge owners have been brought in as third parties) recovered judgment against the owners of the steamship *Devonshire* and the tug owners. (2) Under this judgment the tug owners have paid a sum of 937*l.* 4*s.* 8*d.*, and certain costs have also been paid, or are payable. The claim now made by the tug owners against the barge owners is to be indemnified in respect of that sum and costs. The contract between them was one for towage under the terms specified in a general towage requisition, dated July 22, 1907. The barge owners may be described as customers of the tug owners in respect of the towage of barges since that date upon contracts incorporating the general terms contained in that requisition; and those terms are applicable to the contract for the towage of the *Leslie* in this particular case. The terms of the towage requisition are as follows: [The learned President read the terms of the towage contract (already set out), and continued:]

Certain facts were given in evidence relating to various questions which were raised in argument, which, in the view I take of the contract between the parties, need not be set out or discussed. The tug owners' contention was that there was an implied contract of indemnity. The barge owners' contention was that there was not; and, alternatively, that, if there was,

(1) For a statement of the facts see [1912] P. 27 to 31.
(2) [1912] P. 68.

1912

THE DEVONSHIRE AND ST. WINIFRED.

The President.

they were freed from liability on other grounds which were pleaded, and to which the facts referred to related. The argument for the tug owners was that they were relieved by the contract from all liability and from all loss, however incurred or caused, while the towing was carried out; and that consequently there was in their contract with the barge owners an implied term that they should be indemnified from all liability and loss whatsoever. Authorities like *Hamlyn* v. *Wood* (1), *The Moorcock* (2), and *Kruger & Co.* v. *Moel Tryvan Ship Co.* (3) were relied upon.

In my view the contract in this case is an ordinary business contract which speaks for itself, and which does not require any implied term to give it efficacy, or to give it the effect which was intended by the parties. Dealing with contracts of indemnity and third-party procedure, Bowen L.J. in *Birmingham and District Land Co.* v. *London and North Western Ry. Co.* (4) says as follows: "I think it tolerably clear that the rule,"—i.e. the third-party rule—"when it deals with claims to indemnity, means claims to indemnity as such either at law or in equity. In nine cases out of ten a right to indemnity, if it exists at all as such, must be created either by express contract or by implied contract: by express contract if it is given in terms by the contract between the two parties; by implied contract if the true inference to be drawn from the facts is that the parties intended such indemnity, even if they did not express themselves to that effect, or if there is a state of circumstances to which the law attaches a legal or equitable duty to indemnify, there being many cases in which a remedy is given upon an assumed promise by a person to do what, under the circumstances, he ought to do. I say in nine cases out of ten, for there may possibly be a tenth. Thus there might be a statute enacting that under certain circumstances a person should be entitled to indemnity as such, in which case the right would not arise out of contract, and I do not say that there may not be other cases of a direct right in equity to an indemnity as such which does not come within the rule that all indemnity must arise out of contract express or implied."

(1) [1891] 2 Q. B. 488.
(2) (1889) 14 P. D. 64.
(3) [1906] 2 K. B. 792, at p. 801; [1907] A. C. 272.
(4) (1886) 34 Ch. D. 261, at p. 274.

1912

THE DEVONSHIRE AND ST. WINIFRED.

The President.

The contract in this case is between A. (the tug owners) and B. (the barge owners). It means that A. is not to be responsible or liable to B. for damage, injury, or loss however occasioned: not that A. is not to be responsible or liable to any one. In the circumstances of this case A. was responsible and liable to, and suffered judgment at the suit of, other persons, namely, the cargo owners, for the negligence of A. A. seeks to say, not merely "I shall not be responsible or liable to you, B., for any damage, injury, or loss, which may in any way arise out of the towage," but, further, "You, B., are responsible and liable to me, A., for any such damage, &c., for which I may be responsible or liable to the rest of the world." The contract does not say so. I do not believe that the parties intended that it should impliedly mean that. To make such an implication is not in any sense necessary for the efficient performance of the contract. To introduce such an implied term would, I think, be to make a wholly different contract from that which was made, or which the parties intended to make.

Many instances might be given of liability by the tug owners to persons entirely unconnected with either themselves or the barge owners, as well as to persons in their employ, which the contention of the tug owners would comprise, and which the general words of the contract would cover according to that contention—e.g., where an independent craft was run down, even wilfully, by the tug-master; where personal injuries were suffered by the crew of the tug by reason of defective tackle provided by the employer, in respect of which a judgment might be obtained in a common law action for negligence; or where compensation was awarded for injuries caused to them under the Workmen's Compensation Act, 1906. Could it be said that the barge owners by this contract had impliedly agreed to indemnify the tug owners against damage or loss in such cases, or that it was contemplated between the parties that such damage or loss should be borne by the barge owners? I think not. No doubt parties in similar situations can make contracts of indemnity as was done in the case of *The Millwall* (1), but they should make them in express terms.

(1) [1905] P. 155.

1912

THE DEVONSHIRE AND ST. WINIFRED.

In this contract there is no express indemnity, and I find that no indemnity is implied. Judgment, therefore, must be entered for the third parties, with costs.

Solicitors for the owners of the *St. Winifred*: *Hill, Dickinson & Co., Liverpool.*

Solicitors for the third parties: *Batesons, Warr & Wimshurst Liverpool.*

T. L. M.

[IN THE CONSISTORY COURT OF EXETER.]

1912

July 18; *Aug.* 16.

THE ARCHDEACON OF EXETER *v.* GREEN.

Ecclesiastical Law—Civil Suit—Procurations—Claim for Procurations by Archdeacon holding Visitation outside Limits of Defendant's Parish— 26 *Hen.* 8, *c.* 3—*The Ecclesiastical Fees Act,* 1867 (30 *&* 31 *Vict. c.* 135)—*Tables of Ecclesiastical Fees, London Gazette, March* 19, 1869, *and June* 2, 1908—*Canons* 86 *and* 125 *of Canons of* 1603.

Except in those archdeaconries where by arrangement with the Ecclesiastical Commissioners procurations in respect of archidiaconal procurations are not required to be paid by the clergy, the incumbents of parishes cited to attend the annual visitation of the archdeacon within whose jurisdiction their benefices are situated, if not otherwise exempt, are legally bound to pay procurations to the archdeacon at the customary rate, notwithstanding that the archdeacon has not personally visited the parish in respect of which the procurations are claimed either personally or by deputy, and although the visitation is held in another parish or in the cathedral of the diocese and for a number of parishes collectively.

The Archdeacon of Exeter claimed in a civil suit brought against the incumbent of a parish within his archdeaconry a procuration of ten shillings in respect of his annual visitation in that year held for a number of parishes within the archdeaconry, including the defendant's parish, on May 8, 1911, in a parish of which the defendant was not the incumbent and in the cathedral of the diocese. The defendant was cited to attend the visitation, but did not appear at it or pay the sum claimed from him. At the hearing it appeared that no arrangement had been made with the Ecclesiastical Commissioners under which procurations in respect of the archdeacon's visitation would not be required to be paid, and that ten shillings was the amount at which the procurations in kind formerly payable to the archdeacon in respect of the defendant's parish had been commuted:—

Held, that the defendant was legally liable to pay to the promovent the

1912

EXETER (ARCHDEACON) v. GREEN.

customary procuration of ten shillings due and payable to him as archdeacon in respect of his visitation in 1911 notwithstanding that the archdeacon had not visited the defendant's parish either personally or by deputy, but had held his visitation outside the defendant's parish and for a number of parishes at one and the same time.

Held, also, that the Ecclesiastical Fees Act, 1867, and the tables of fees thereunder afforded no defence to the suit, as the fees under that Act so far as they relate to visitations are confined to fees payable by the churchwardens of parishes in cases where they have funds to pay them, and are not fees which affect, or are substituted for, procurations payable by the incumbents of parishes.

The Court ordered that as long as the defendant remained beneficed in the benefice of which he was incumbent at the date of the judgment in the suit he should pay to the Archdeacon of Exeter for the time being the annual sum of ten shillings in respect of procurations due and payable by him to the archdeacon in respect of the archidiaconal visitations from and inclusive of the year 1912 and onwards.

THIS was a civil suit promoted by the Venerable Frederick Arthur Sanders, Archdeacon of Exeter, against the Reverend William Frederick Green, vicar of the parish of East Budleigh, in the county of Devon, deanery of Aylesbeare, archdeaconry of Exeter, and diocese of Exeter, for procurations due and payable to the promovent as Archdeacon of Exeter.

The libel in the suit alleged, inter alia, that in the month of April, 1911, the defendant was duly cited to appear at the visitation and visitation court of the Archdeacon of Exeter to be held on Monday, May 8, 1911, in the Church of St. Mary Major, Exeter, and at the Chapter House in the Cathedral Church of St. Peter's, Exeter, respectively, and that the defendant did not appear, although he signed the presentment which was presented to the archdeacon at his visitation. The libel further alleged that of common right, by endowment, or by custom, fees or payments were due and payable to the promovent as Archdeacon of Exeter on his visitation by the rectors and vicars of the parishes comprised in the archdeaconry in respect of procurations, and that the customary amount due and payable to the promovent by the defendant as vicar of East Budleigh was ten shillings in respect of such procurations for each visitation, and the defendant, though frequently asked to pay the procurations in respect of the said visitation, had neglected and refused so to do.

The libel concluded with a prayer that the Court would decree

that the defendant was liable to pay to the promovent procurations at each visitation of the archdeacon and was liable to pay in respect of the visitation of 1911 the sum of ten shillings for such procurations; that the defendant might be ordered to pay to the plaintiff the said sum or such sum as the Court might find to be due and payable in respect of such procurations, and that he might be condemned in the costs of the cause.

The defendant by his answer to the libel denied (1.) that the archdeacon visited the parish of East Budleigh in 1911, and (2.) that the visitation and visitation court were duly held for that parish, and alleged that there was no endowment or custom with respect to procurations and that no fees or payments were due and payable for them as stated in the libel. The answer then pleaded that the Ecclesiastical Fees Act, 1867, provided that such fees as were specified in the tables of fees issued under that Act and none others should be demanded, taken, or received by the archdeacons in respect of their visitations, and that the fee or payment provided by the tables of fees in force under the Act to be taken, demanded, or received by the archdeacons in respect of their visitations was fixed and settled at the sum of two shillings. (1) The answer further alleged that the claim originally put forward was for payment of twelve shillings and ten pence, which included a claim of two shillings and ten pence for synodals.

The answer concluded with the following paragraph:—

"The defendant further alleges that the said procurations are unreasonable. A procuration was a fee or payment made to the archdeacons by reason of the expense incurred by them when they visited the several churches comprised in their respective archdeaconries. In default of a personal visitation to any individual parish the procuration was not payable to the archdeacon because he had not incurred the expense. If more than one parish was visited in one day only one procuration was payable. The visitation alleged in the libel was held for all the parishes comprised in the said archdeaconry or in the deanery of Aylesbeare and on one day, namely, the 8th May, 1911."

The promovent brought in a reply to the answer and pleaded

(1) See note at end of report.

1912

EXETER (ARCHDEACON) v. GREEN.

in substance that the Ecclesiastical Fees Act, 1867, had no application to and did not affect the rights claimed in the libel and did not afford any answer to the promovent's claim.

1912. July 18. The cause was heard before the Chancellor of the diocese of Exeter (Sir Charles E. H. Chadwyck-Healey). (1)

The promovent and E. W. Luke, the registrar of the archdeaconry of Exeter, gave evidence in support of the libel. The promovent stated in his evidence that the emoluments of the other two archdeaconries in the diocese of Exeter were originally below 200*l.* a year, and having been increased by the Ecclesiastical Commissioners to that sum, the Commissioners, as a condition, had made an arrangement whereby in those archdeaconries archidiaconal procurations were no longer required to be paid by the clergy, but no such arrangement with respect to procurations had been made with the Archdeacon of Exeter, and in that archdeaconry the payment of procurations was still enforced.

The result of the remainder of the evidence appears from the judgment.

No witnesses were called for the defendant.

It appeared that the sum of ten shillings was the amount at which in the case of the vicar of East Budleigh the procurations formerly payable to the archdeacon in kind had been commuted. (2)

(1) The Court sat in the Chapter House of Exeter Cathedral.

(2) The libel in the suit moreover contained allegations that a printed notice signed by the Registrar of the Archdeaconry of Exeter in the accustomed form, announcing an approaching visitation by the promovent, setting out the places and days of the visitation and the times of the services to be held and the places and times for the holding of the visitation courts, and stating that all rectors, vicars of churches, curates, and others celebrating divine service were thereby cited to appear at the times and places therein mentioned, and addressed to the reverend the incumbent and the churchwardens of the parish of East Budleigh, was sent by post to and in due course received by the defendant, and that the defendant had been duly cited to attend the visitation and visitation courts as thereinbefore appeared. To this portion of the libel the defendant pleaded in his answer that "the defendant did not admit that he was duly cited to attend the alleged visitation and that the citation was not duly served upon him." No question was

1912

EXETER (ARCHDEACON) v. GREEN.

E. W. Hansell, for the promovent. The promovent receives from the Ecclesiastical Commissioners an equivalent for synodals payable by the incumbents of the 200 parishes in the archdeaconry of Exeter and therefore does not make in this suit the claim referred to in the answer for two shillings and ten pence for synodals, and only now seeks to recover the annual sum of ten shillings for procurations, the amount fixed and ascertained as long ago as the reign of Henry VIII. as due and payable as a commutation in money for the archidiaconal procurations in respect of the benefice of East Budleigh formerly required to be paid in kind; the same sum of ten shillings being specified as the sum to be paid as procurations in respect of that benefice in the Valor Ecclesiasticus (1) and in Bacon's Thesaurus (2), and having remained unaltered until the present day. Whatever may have been the case when procurations were paid in kind, it is certain that after the tenth of the revenues of ecclesiastical authorities now vested in Queen Anne's Bounty were given to the Crown under 26 Hen. 8, c. 3, s. 10, the amount of ten shillings as a procuration was due and payable to the Archdeacon of Exeter of common right whether or not he personally visited the parish in respect of which the procuration was claimed; the convenient practice having been established of the archdeacon holding his visitation for groups of parishes—see *Shephard* v. *Payne* (3)—and either at some specified parish church or in the cathedral of the diocese. Without going farther back, this practice of holding the archidiaconal visitation at some central place for several of the parishes of the Archdeaconry of Exeter has prevailed since 1855.

The 86th canon of the Canons of 1603 provides that every archdeacon and others which have authority to hold ecclesiastical visitations by composition law or prescription shall

however, raised at the hearing with respect to the defendant not having been duly cited, and no decision was consequently given by the Court as to the validity of the citation of the defendant to attend the visitation.

(1) Valor Ecclesiasticus tempore Henry VIII. auctoritate regia institutus [A.D. 1535] cum appendice et indicibus (edited by Joseph Hunter for the Record Commission), ed. 1810—1834, vol. ii., p. 310.

(2) Liber Regis vel Thesaurus Rerum Ecclesiasticarum, by John Bacon, 1786, p. 246.

(3) (1862) 12 C. B. (N.S.) 414; (1864) 16 C. B. (N.S.) 132.

1912

EXETER (ARCHDEACON) v. GREEN.

"survey the churches of his or their jurisdiction once in every three years in his own person or cause the same to be done," and the visitation of parishes by the rural dean under the present practice is a compliance with this canon and dispenses with the personal visitation of the archdeacon in individual parishes; whilst canon 125 of the Canons of 1603 supports the practice of visitation courts being held in such places as shall be convenient for the entertainment of those who are to make their appearance there. The provisions of the Ecclesiastical Fees Act, 1867, and the tables of fees made thereunder do not in any way affect the promovent's claim, for although certain fees in those tables relate to visitations by archdeacons, the Act has clearly nothing to do with procurations which are not fees properly so called, whilst the fees under the Act are confined to fees receivable from the churchwardens and not from the incumbents of benefices. [He referred to the following authorities: — *Saunderson* v. *Clagget* (1); Stephens' Laws of the Clergy, p. 1393; Phillimore's Ecclesiastical Law, vol. ii., p. 1059; Laws of England, vol. xi., p. 440.]

Harold Hardy, for the defendant. The fee claimed as a procuration in this suit in respect of the annual visitation of the Archdeacon of Exeter on May 8, 1911, is not legally due or payable, the Archdeacon having failed in his duty to hold the visitation in the parish of East Budleigh either personally or by deputy. It is only in the circumstances of a personal visitation by the Archdeacon or his deputy that the payment of archidiaconal procurations now paid as a composition in money can be legally enforced. Such procurations have still all the incidents belonging to them as belonged to the procurations paid in kind for which they were substituted in the thirteenth century, and the procuration now paid in money, like the procuration formerly paid in kind, is not a stipend, but a provision for the visitor visiting the parish in respect of which the procuration is claimed and which is still not due unless the individual parish is visited. [He referred to Phillimore's Ecclesiastical Law, vol. ii., p. 1060, and also to Gibson's Visitations Parochial and General, ed. 1717, pp. 10, 12, and 15, as to the difference between

(1) (1720) 1 P. Wms. 657, 662.

parochial visitations and the visitation courts held under the present system in specified parishes.] *Saunderson* v. *Clagget* (1) has no application to the present case and only involved a question as to the liability of a curate in charge for procurations. *Shephard* v. *Payne* (2) was a suit with respect to fees payable by churchwardens and did not touch any question as to procurations from the clergy. The defendant has a good defence if the procuration claimed by the Archdeacon cannot be recovered owing to his not having personally or by deputy visited the defendant's parish, but if this defence is not a good defence the defendant relies on the Ecclesiastical Fees Act, 1867, as reducing the amount which the Archdeacon is entitled to recover to the sum of two shillings for each visitation, that being the sum which, according to the tables of fees now in force under the Act (3), the Archdeacon is entitled to receive in respect of his visitation. No other fee material to this case is allowed under the Act or can be legally claimed, and the Act has thus virtually abolished the compositions for procurations payable by the clergy before it came into force.

Hansell replied.

Cur. adv. vult.

Aug. 16. THE CHANCELLOR. In this cause the Venerable Frederick Arthur Sanders, Archdeacon of Exeter since 1909, seeks to establish against the Reverend William Frederick Green, vicar of the parish of East Budleigh, in the deanery of Aylesbeare, in the archdeaconry of Exeter, his claim as archdeacon to procurations. The libel in the cause and the first three paragraphs of the defendant's answer thereto contain allegations to the following effect. [The Chancellor summarized the contents of the libel and of the first three paragraphs of the answer as above set out, and, having read at length the concluding paragraph of the answer, continued:] I should observe here that the amount of two shillings and ten pence for synodals mentioned in the answer as originally put forward as part of the claim is not claimed in this cause.

(1) 1 P. Wms. 657, 662.
(2) 12 C. B. (N.S.) 414.
(3) *London Gazette*, March 19, 1869, and June 2, 1908 (see note at end of report).

1912

EXETER (ARCHDEACON) v. GREEN.

The Chancellor.

The Archdeacon in his reply contends that the Ecclesiastical Fees Act, 1867, has no application and affords no answer to the claim. As was to be expected, there has been no substantial dispute as to the facts. The contest between the parties, which I should say has been conducted with the utmost good feeling on both sides, involved almost entirely questions of law. Put shortly and principally they were, first, the points raised by the paragraph of the answer which I have quoted, namely, whether an archdeacon can claim procurations when he does not visit the parish—in other words, whether under the present usual system of what I may call collective or synodal visitation procurations are payable at all; and, next, whether or not the Ecclesiastical Fees Act, 1867, has abolished procurations, or has included them in a fee of two shillings in every case, irrespective of the amounts, by no means uniform, charged on benefices in the Kingdom.

André de Vaulx the canonist, commonly quoted as Vallensis, defines "procuration" as "necessariorum sumptuum exhibitio, quae ratione visitationis debetur ab Ecclesia vel Monasterio, ei cui ex officio incumbit jus et onus visitandi, sive is sit episcopus, sive Archidiaconus, sive Decanus, sive Legatus S. Pontificis" (Paratitla sive summaria et methodica explicatio Decretalium D. Gregorii Papae IX., ed. 1649, lib. 3, tit. xxxix., De Censibus Exactionibus et Procurationibus, s. 3, p. 616).

It is scarcely necessary here to refer in detail to very early Constitutions governing the practice of providing entertainment for bishops and archdeacons upon their visitations, such as the Constitutions of the Councils of Braga and Toledo in the sixth century and the precepts of Archbishop Hinckmar of Rheims to his archdeacons in the ninth century. It will suffice to observe that from the earliest time the practice of taking procurations seems to have led to oppression and that ordinances of various kinds were from time to time framed to correct or prevent abuse. The Council of the Lateran in 1179 prescribed that no archbishop in his provincial visitation should take with him more than forty or fifty horses, no bishop more than twenty or thirty, while an archdeacon was to be content with five or seven (Mansi, Sacrorum Conciliorum Nova Collectio, vol. xxii., p. 220). At the Council of Oxford in 1222 archdeacons were strictly

prohibited from extorting procurations or from receiving them without reasonable cause or except for the day on which they personally visited the churches (Wilkins, Concilia, vol. i., p. 588). These procurations were originally paid "in victualibus." Innocent IV., who became Pope in 1243, made a Constitution, which was afterwards ratified by a General Council at Lyons under Gregory X., about 1273, which forbade the taking of money in lieu of victuals (Mansi, vol. xxiv., p. 98). The Papal Legate Othobon in 1268 issued a Constitution in England to enforce the moderation in company and demands prescribed by Innocent IV. (Wilkins, Concilia, vol. ii., p. 9; John de Athon, Const. Othoboni, tit. 18, p. 114). Archbishop Stephen Langton about the same time issued a Constitution to the like effect (Lyndwood, Provinciale, lib. iii., tit. 22).

The practice of paying procurations in kind seems to have lasted until the time of Pope Boniface VIII. (1294—1303). He issued an important Constitution which should be quoted in full:—

". . . . Verum quoniam rerum experientia nos instruxit, ex hoctam personis visitantibus quam locis et ecclesiis visitatis multa incommodum dispendia provenire: concedimus, ut patriarchæ, archiepiscopi, episcopi et alii, quibus ex officio competit visitare, a volentibus ecclesiarum et locorum visitatorum rectoribus seu personis pecuniam licite recipere valeant pro sumptibus moderatis faciendis in victualibus, diebus, quibus visitationis officium personaliter exercebunt, adiicientes, quod non liceat visitanti nisi unam procurationem recipere una die, sivé unum locum solum visitaverit sive plura, etiamsi locus quilibet visitatis ab illo sufficeret ad procurationem integram persolvendum; quum eidem sufficere debeat, ut temporalia metat a locis personaliter visitatis pro diebus quibus ejus spiritualia subministrat . . . ." (1)

Archbishop Stratford in 1341 promulgated a Constitution (Lyndwood, Provinciale, lib. iii., tit. 22) prohibiting receipt of procurations except upon diligent and personal visitation, and if several churches were visited in one day only one procuration, either in victuals or money, contributed rateably by the churches visited, was to be taken.

(1) X. iii. 20, 3.

1912

EXETER (ARCHDEACON) v. GREEN.

The Chancellor.

Pausing here for a moment, it seems to be clear that in the early years of the fourteenth century visitors were only entitled to receive procurations if they actually visited the churches, and then only for one day, and the procuration might be paid either in money or in kind with the consent of the person visited, upon whom the charge would fall. The substitution of a money payment for the actual entertainment of the visitor and his retinue was a step of great importance, and apparently was only allowed with reluctance. The Constitution of Innocent IV. forbade the taking of money in lieu of provisions under penalty, but Ayliffe, writing in 1734, thought (Parergon, p. 431) that the penalty was only inflicted if money was taken in lieu of procurations without visiting. "For," he says, "if they visited the church they might make the person visited easy by a composition and so the canon seems to imply; that Council well knowing that if they received their procurations in money they would take the money and never visit the church." But the change of practice seems to me to have had a still more important result.

It would tend to convert a burden of a somewhat uncertain and variable character into a pecuniary charge of fixed amount which would in time become a customary payment. This indeed is what actually happened. Lyndwood, in his gloss upon the Constitution of Archbishop Stratford (Lyndwood, Provinciale, ed. 1679, p. 224), wrote that in England the common practice was that an archdeacon received by way of procurations, in money seven shillings and six pence for himself, eighteen pence for his horse, and for every other horse and its burden twelve pence. Lyndwood's Provinciale was completed in 1433. A hundred years later procurations everywhere in this country were payable by fixed sums of money. What exactly happened in the meantime is not easy to ascertain. But in 1534 was passed the Act of Parliament 26 Hen. 8, c. 3, giving first fruits and tenths to the Crown. It provided (s. 10) that certain deductions including procurations and synodals were to be made from the gross value of every benefice and that the tenth to be paid to the Crown was to be the tenth part of the net annual revenue. For this purpose the amounts of these charges were to be ascertained and they were ultimately specified in the Valor Ecclesiasticus

and in the Liber Regis, where they remain to this day unaltered. In the case of East Budleigh procurations were ascertained and fixed at ten shillings and synodals at two shillings and ten pence. The Archdeacon of Exeter was charged with the receipt "in procurationibus ecclesiarum infra dictum archidiaconatum per annum 33*l.* 6*s.* 11*d.*" This sum represents the total of procurations for the archdeaconry of which one tenth is payable to the Crown, or rather to Queen Anne's Bounty. How the respective sums were ascertained and fixed I do not know, but it is more than probable that they were the customary payments at the time.

It was argued that payment of procurations so fixed by the statute of Henry VIII. could not be legally enforced unless the church were personally visited by the archdeacon or his deputy, and that the practice of citing the clergy to centres, as in this case, was not a compliance with the law. Under the ancient Constitutions of the Church visitation of churches separately was no doubt necessary. The question is whether a custom has since grown up which supersedes the ancient rule. There can be no doubt I think, that the general practice of collective visitation is of very long standing. In 1568 the Archdeacon of Exeter held his Easter visitation at Bradninch, which was attended by the warden of Morebath and "his men," who charged their parish for their expenses. In the same year at Midsummer the bishop held his visitation at Tiverton, which the warden and his men also attended and duly charged their parish. They attended the bishop again at Tiverton in 1571, in which year there was also a visitation by the "official" presumably of the archdeacon, place not stated. (1) In another place in The Parish Accounts of Morebath from 1520 to 1573 there is a statement that there were three visitations in one year, namely, the official's visitation after Easter, the bishop's visitation at Midsummer, and the archbishop's at Michaelmas (p. 247). In the adjoining diocese of Bath and Wells the churchwardens of Yatton rode to Charleton (2) in 1544 for the visitation. In 1556 and 1557

(1) The accounts of the Wardens of the parish of Morebath, transcribed by the Rev. J. E. Binney: Exeter, 1904, pp. 235, 236, 247.

(2) Charleton is in the diocese of Exeter. Queen Charleton is probably meant.

1912

EXETER (ARCHDEACON) v. GREEN.

The Chancellor.

they were at Bedminster on the like business. In 1559 they were at St. Mary Redcliffe in Bristol, then within the diocese. Yatton was in the deanery of Redcliffe and Bedminster, as was also Queen Charleton. In 1546 the wardens of Croscombe attended the visitation at Bruton. Both these places are in the deanery of Carey and archdeaconry of Wells. They were there again on the like business in 1558. (Somerset Record Society, vol. iv.)

In 1595 the Archdeacon of St. Albans issued his mandate to the apparitor to warn the clergy of each parish to have their arms and armour in readiness according to the schedule attached and to cite them to appear in the parish church of St. Alban's on Wednesday, November 19 then next, and to certify what they are rated at and the names and surnames of the men which shall bear the arms appointed, and to satisfy all procurations and duties. (1) These are some illustrations which I have found. In "An Historical Discourse on Procurations Synodals and Pentecostals" by "J. S.," otherwise John Stephens, published in 1661, the author, in discussing the derivation of the word "procuration," puts it thus: "Whether it should be for procuring the Visitor to come to each particular Church in his own person and to Visit Ecclesiatim per cunctas dioceses parochiasque suas, which was the ancient custome; Or from procuring of him to come to a certain place in several Divisions or Deaneries where the Clergy within the said distinct Deaneries were to give meeting, as now they doe, they being overcharged with his coming home to them; each man may please himself with his own opinion," He speaks of the custom then of meeting at centres, and as he tells us he had for some time acted as the collector of procurations and other rights and duties for the Archdeacons of Gloucester, his testimony is important, so far as it goes. Gibson's "Charges to the Clergy of Surrey" (2) were published in 1717. At that time he was Bishop of Lincoln. He had been Archdeacon of Surrey and as such delivered the charges at, to use his own

(1) Records of the old archdeaconry of St. Albans: St. Albans and Hertfordshire Architectural and Archæological Society, St. Albans, 1908, p. 94.

(2) "Of visitations parochial and general: Being the charges delivered to the clergy of the Archdeaconry of Surrey."

1912

EXETER (ARCHDEACON) v. GREEN.

The Chancellor.

words, "such visitations as we are now holding (which seem to be only the remains of the ancient synods)" (pp. 10—12). It is manifest that his visitations were not parochial. In this case it has been formally proved that the archdeacon's visitations on which procurations have been demanded have been regularly held at specified centres from 1855 to the present time, a period sufficient to shew ecclesiastical custom.

But it was contended on behalf of the defendant that although these central meetings might be and were visitation courts, they were not visitations for which procurations could be demanded, because they were not parochial; in other words that procurations continue to be based upon parochial visitation and upon that only. In support of that argument reliance was had upon the ancient Constitutions, that of Archbishop Stratford in particular. This argument overlooks, I think, a good deal that has happened since those early days. For example, we have to remember what was effected by the Act of Henry VIII. when procurations were specifically ascertained. By that time money payments had become very general, and it is difficult to suppose that what was done under the Act with respect to procurations was not in the nature of a composition, the final substitution in all cases of a fixed pecuniary charge on the benefice in place of a somewhat undefined or uncertain liability in money or in kind upon the individual from time to time holding the cure. If so it might well be that the payment of the composition was not considered or intended to be dependent upon parochial visitation, and that this was the way in which the matter was regarded is, I think, a reasonable inference from all that has happened since. Gibson seems to have entertained a similar opinion. In his "Charges to the Clergy" (pp. 16 and 17) he devotes some space to the consideration of the question whether under the Constitutions procurations are payable or not if the archdeacon does not visit parochially. He was of opinion that—to quote his words—"in the eye of the Canon-Law singly it seems to be still a good plea for the refusal of procurations that no parochial visitation is made," and he proceeds thus: "But the true foundation upon which they are become due absolutely and unconditionally is from the Statute-Law, which requires the payment of tenths to

1912

EXETER (ARCHDEACON) v. GREEN.

The Chancellor.

the Crown; and these procurations, being brought to a certainty in money before the Valuation of Ecclesiastical Promotions in the Reign of King Henry the Eighth, were then rated as the fixt and standing Revenues of the Archdeacons, and the same law that entitles the Crown to the yearly Tenth does of course entitle the Archdeacon yearly to the Nine Parts of which that is the Tenth."

The dissolution of the religious houses naturally affected the question of procurations and we find them treated as profits or emoluments and not dependent upon visitation for their payment. The statute of 34 & 35 Hen. 8, c. 19, s. 4, provided that if any person or persons being farmer, that is lessee, or occupier of any lands or hereditaments of any of the late monasteries by the King's grant should wilfully deny payment of any pension, portion, corrody, synodies or proxies theretofore paid to archbishops, bishops, or archdeacons, then the latter should recover the same as they could theretofore. Obviously here visitation was out of the question. Again, in the statute of 32 Hen. 8, c. 22, s. 3, it will be observed that procurations, there also termed "proxies," and synodals are adduced as examples of "profits and emoluments." In the Act for the dissolution of monasteries, 31 Hen. 8, c. 13, s. 4, "synods and proxies" are grouped with rents, charges, pensions and "other profits." Still further, as I have already noticed, in 34 & 35 Hen. 8, c. 19, s. 4, proxies are mentioned as profits lawfully issuing, answered or paid to bishops and archbishops out of manors, lands, tenements, parsonages, benefices, or the hereditaments of the late dissolved monasteries, and provision is made for the recovery of them.

There was an early case decided in the Exchequer of Ireland in the second year of James I. I refer to *The King* v. *Sir Ambrose Forth.* (1) The arguments are fully stated, from the reports of Sir John Davys printed in 1674, in Godolphin's Repertorium, pp. 75 to 79, and Stephens also deals with the case in his "Historical Discourse" (p. 37 et seq). The facts, to put them very shortly, were as follows. Before the dissolution of the religious houses the Bishop of Meath was

(1) Nomine Le Case de Proxies (1604), Davys, 1.

entitled to a procuration payable out of a commandery part of the possessions of the Hospital of St. John of Jerusalem and to another payable out of an impropriate rectory parcel of the Abbey of Thomascourt. Upon the dissolution the possessions of both these houses were vested in actual possession of the Crown by Act of Parliament saving the proxies, as they were called, to all bishops and their successors. Afterwards the bishop granted the proxies to the King, who was at the time in actual possession of the commandery and rectory out of which the procurations were payable. Afterwards again Queen Elizabeth demised the commandery and rectory to the defendant, who was one of the Masters in Chancery, and the question was whether Sir Ambrose Forth should pay these proxies or procurations to the King. It was objected by Sir Ambrose Forth's counsel that proxies were extinct by the suppression of the religious houses, for that their visitation was the sole cause of the procurations et cessante causa cessat effectus; that when the cause, the visitation, ceased, the procuration ceased also. The latter, it was argued, was contingent and payable only upon every visitation. There were other arguments, amongst them that the bishop, although he might grant his temporal possessions with the assent of his chapter or clergy, yet he could not grant his procurations for his visitations, which were perquisites or profits of his spiritual jurisdiction. On the part of the King it was answered, and so decided by the Court, that the proxies were not extinguished by the dissolution of the religious houses and that the bishop had well granted them. It was put that when the old practice had become intolerable every church was reasonably taxed and every proxy reduced to a reasonable sum of money payable yearly in the nature of a pension to the Ordinary, who had power of visitation de mero jure. "After the Procuration of Victuals was reduced to a certain sum the Churches and Religious houses paid it to the Ordinary yearly albeit he made not any visitation: And so the rule of cessat causa cessat effectus doth not hold in this case. These certain sums of money which come in lieu of Proxies and retain the name of Proxies are by ancient Composition made parcel of the certain and settled Revenues of the Bishop, do remain for ever, and are not subject to extinguishment." Further on we read, "So Proxies are due and

1912

EXETER (ARCHDEACON) v. GREEN. — The Chancellor.

payable to Ordinaries out of the Impropriations and Religious houses dissolved although their Visitation ceases," and again that "also the Proxies being now reduced to certain sums of money and so made part of the certain settled and perpetual Revenue of the Bishop may be granted by him as well as a part of the Tithes or an Annuity or any of his Rents Services or other Hereditaments Temporal." This I think is the substance of that case, so far as it bears upon the present question.

In recent years, so far as I am aware, there has been very little litigation in this matter. There was a suit in the Consistory Court of Norwich in 1860 which was mentioned in argument, but objection having been taken to the report of it, I have thought it better not to rely upon it. There was another in the county court of Chester in 1875, and I have had an opportunity of reading the shorthand note of the judgment. It was a suit by the Ecclesiastical Commissioners against the rector of Barthomley in the Archdeaconry of Chester. The Commissioners claimed synodals for the years 1872, 1873, and 1874, annual procurations for the same years, and one triennial procuration accruing during the same period. These sums were claimed by the Commissioners as vested in them under 23 & 24 Vict. c. 124, s. 2, as part of the emoluments of the see. It appeared that in Chester procurations were paid to the archdeacons annually and to the bishop every third year up to 1541. In that year the Archdeaconry of Chester, which had formerly been in the diocese of Coventry and Lichfield, was united with the Archdeaconry of Richmond, then in York diocese, to form the new diocese of Chester. Under the charter of foundation all archidiaconal power became vested in the bishop subject to the payment by him of 50*l.* yearly to each of the archdeacons who were thenceforth deprived of all jurisdiction except at the will of the bishop. The claim of the plaintiffs was that the dues formed part of the ordinary revenues of the see, and having acquired a temporal character analogous to that of pensions chargeable on the revenues of a see or parsonage, they were entitled to recover them. It was argued, as here, that if there were no visitation there could be no procuration, but it was held that visitation was a condition precedent while procurations were paid in kind,

but when commuted they became part of the settled revenue of the bishop or archdeacon and were payable even if there were no visitation. The shorthand note of the judgment has it that the case of *Rex* v. *Sir A. Vaughan* (1), reported by Sir J. Davys, was referred to, but this is I think obviously a mistake by the reporter, and that the authority was *The King* v. *Sir Ambrose Forth* (1) to which I have referred. Judgment was given for the Commissioners with leave to appeal, but no appeal followed. I may observe that the learned judge seems to have had some doubt as to his jurisdiction, and I gather that if the plaintiff had been the bishop he should have held that the spiritual Court was the proper forum, but as the Commissioners, lay plaintiffs, were suing in respect of a temporal right, he considered that he could try the case. At least this is how I understand his position.

Apart from legal proceedings the opinions of eminent lawyers have been taken from time to time. In 1868 a question arose between the Ecclesiastical Commissioners and the then Archbishop of Canterbury as to the right of the latter to require the Commissioners, who had acquired certain impropriate or rectorial estates to pay him procurations in respect of them. It was admitted that procurations were payable by custom, but inasmuch as the estates and emoluments of the see of Canterbury had become vested in the Ecclesiastical Commission under 23 & 24 Vict. c. 124, s. 2, the Commissioners considered that the fees had passed to them and were not payable to the archbishop. On that occasion the Commissioners took the opinion of the then law officers of the Crown, Sir John Karslake, Sir William Brett, and Sir Travers Twiss, who advised that bishops entitled to fixed incomes under 13 & 14 Vict. c. 94, s. 17, were not entitled to take procurations from either spiritual or impropriate rectories in addition thereto, and that the Commissioners were entitled to take them into account in dealing with the income of their sees; and that in the case of the bishops whose endowments had become vested in the Commissioners under 23 & 24 Vict. c. 124, s. 2, the Commissioners were entitled to claim the procuration fees from the parties previously liable to the bishop. Some years after this a question arose between the then Bishop of Peterborough

(1) Nomine Le Case de Proxies, Davys, 1.

1912

EXETER (ARCHDEACON) v. GREEN.

The Chancellor.

and one of his clergy, the Reverend M. S. A. Walrond, as to the right of the bishop to require payment of procurations. It was objected that they were not payable to his Lordship, but, if at all, to the Ecclesiastical Commissioners, and Mr. Walrond took the opinion of Sir John Karslake and Mr. Benjamin Shaw, who advised that the bishop was not entitled to take the procurations. This opinion was submitted by the Bishop of Peterborough to three counsel, Dr. Archibald Stephens, Q.C., Mr. Field, Q.C., and Mr. Fitzjames Stephen, and their opinions were all in favour of the title of the Commissioners to procurations theretofore payable to the bishop, whose estate and endowments had passed to the Commissioners under 23 & 24 Vict. c. 124, s. 2.

It seems, however, that notwithstanding these opinions procurations were still claimed by the bishops of most dioceses down to 1872 at least. Accordingly early in 1873 the Commissioners invited the law officers of the Crown, Sir John D. Coleridge and Sir George Jessel, with Dr. Deane and Mr. Charles Bowen, to state whether or not in their opinion the procurations theretofore, payable to archbishops and bishops were then due to the Ecclesiastical Commissioners. The answer was that such procurations were then due to the Ecclesiastical Commissioners. I am indebted for this information, in answer to my inquiry, to the Ecclesiastical Commissioners. I do not overlook the fact that these opinions, while they recognize the power of transfer into lay hands of the procurations, do not touch, one way or the other the question whether the procurations must be supported by acts of visitation by the former spiritual holder.

I was much pressed by Mr. Hardy on behalf of the defendant to hold that the Ecclesiastical Fees Act, 1867, and the table of fees settled thereunder in 1908 (1) had in effect substituted for the old procuration of ten shillings a fee of two shillings—in other words that the ten shillings which he admitted was the customary payment, but dependent according to his case upon parochial or personal visitation, was abolished and a statutory fee of two shillings was substituted, which he contended was amply sufficient to cover the expenses of the archdeacon or his deputy for holding visitation courts for

(1) *London Gazette*, June 2, 1908. See note at end of report.

grouped parishes. My attention was called to the preamble of the Act, which states that " . . . . whereas the fees payable to Chancellors or Vicars General, Registrars, Secretaries and other officers of Archbishops and Bishops . . . . and to Archdeacons and their Officials, on Visitations of Archbishops and Bishops and Archdeacons respectively, vary in the several dioceses of such Archbishops and Bishops, and it is expedient that the same fees be assimilated." I was also referred to the provision in the Act that, so soon as the table of fees should be settled in accordance with the Act and be not disallowed, " such fees, or such parts thereof as shall not be disallowed, and none others, shall thenceforward be demanded, taken, or received by such Officers and Persons, and on such occasions respectively as hereinbefore mentioned; . . . . " In the table the fee of two shillings occurs under the heading " Archdeacon or Official," which is in the same column as " Vicar General or Chancellor," but I do not find a word in the document explanatory of what services this fee was intended to be the reward.

I have given careful consideration to this part of the case, as I need scarcely say I have also to the rest of the arguments addressed to me on behalf of the defendant, and I cannot accept as valid the contention based upon the Ecclesiastical Fees Act, 1867. In my judgment that Act merely purported to provide fixed fees for officials in the place of the various and differing fees for ministerial purposes obtaining in the different dioceses, all which fees in the case of visitations are payable by the churchwardens, if they have the funds, and not by the incumbents. I do not find anything in the table which could touch a procuration due in respect of the right of an archbishop or a bishop although these procurations are still held to be payable, although I believe not now actually collected, and I cannot read into the words " Archidiaconal Visitation—Archdeacon or Official " an intention to release a benefice from an existing charge upon it, and presumably to throw a substituted fee upon the churchwardens in the case of an archdeacon's visitation, while the same benefice would remain chargeable for a metropolitan or episcopal visitation. Moreover it is difficult to see how any procuration in lay hands could be affected by this Act. I must hold that

1912

EXETER (ARCHDEACON) v. GREEN.

The Chancellor.

the Ecclesiastical Fees Act, 1867, affords no defence in this cause.

Upon the whole case I am of opinion that the customary procuration of ten shillings is annually due and payable to the archdeacon, and that whether the visitation is held as in the past and now in groups or individually and parochially. I have not dealt specifically with the arguments used by Godolphin (Repertorium, p. 69), by Ayliffe (Parergon, p. 431), by Gibson (Codex, ed. 1761, p. 976), Stephens ("Historical Discourse," pp. 29 et seq.), and others, that archdeacons should have their procurations although inhibited from visiting, because in this case it was not disputed, and I think rightly, that they should have their procurations on those occasions.

The order of the Court therefore is that the defendant do pay to the plaintiff the sum of ten shillings due from the former to the latter for procurations for the year 1911, and that so long as he remains beneficed at East Budleigh he do pay to the Archdeacon of Exeter for the time being the annual sum of ten shillings in respect of such procurations from and inclusive of the year 1912 and onwards, and as the plaintiff has been successful in his claim the defendant must pay the costs of the cause.

Solicitors for promovent: *Bembridge & Luke.*
Solicitor for defendant: *H. W. Michelmore.*

NOTE.—The Ecclesiastical Fees Act, 1867 (30 & 31 Vict. c. 135), s. 1, provides as follows: "From and after the passing of this Act the Archbishop of Canterbury, the Lord Chancellor, and the Archbishop of York, with the assistance of the vicars general of the said two archbishops, may from time to time, with the consent of the Lords Commissioners of Her Majesty's Treasury, settle a table or tables of the fees and payments to be made to . . . . archdeacons and their officials, and other officers, on the visitation of such . . . . archdeacons . . . . which table or tables of fees shall be submitted to Her Majesty's Privy Council, who may disallow the same or any part thereof, and notice shall be given in the *London Gazette* of such submission to the Privy Council; and if within the space of three months from the time of giving such notice the same shall not be disallowed, such fees, or such parts thereof as shall not be disallowed, and none others, shall thenceforth be demanded, taken, or received by such officers and persons, and on such occasions respectively, as hereinbefore mentioned . . . . Provided . . . . that every such table of fees, when allowed by the Privy Council, shall be laid before Parliament within thirty days, if Parliament be then

sitting, and if not, then within thirty days after the then next meeting of Parliament."

The tables of fees under this Act in force at the date of the judgment in the suit are printed in the *London Gazette* of March 19, 1869, and June 2, 1908, and the following are the parts of the first of these tables which are material to this report:—

"Table of Fees and payments to be made . . . . to the Chancellors, Vicars General, Registraries and other officers of Archbishops and Bishops and to Archdeacons and their officials and other officers on the Visitation of such Archbishops and Bishops and Archdeacons respectively settled pursuant to the provisions of the Act 30 & 31 Vict. c. 135.

. . . . . .

—	Vicar General, Chancellor, Archdeacon, or Official.	Registrar or other Officer performing the Duty.	Apparitor.
	£ s. d.	£ s. d.	£ s. d.
3. Episcopal or Archidiaconal Visitation	0 2 0	0 12 6	0 3 6

"3. The Chancellor's fee includes the attendance of the Chancellor or his surrogate, the examination of the presentments of the outgoing churchwardens, and the admission of the new churchwardens to office. The Registrar's fee includes the drawing and issuing of the inhibition and of the mandate for the citation of the clergy, the preparation of the visitation books and of the articles of enquiry and the presentment papers, the attendance at the visitation and attesting the presentments and declarations of the churchwardens, the registering the papers exhibited by the clergy, the tabulating in the registry the copies of the register books of baptisms and burials and other papers required to be annually transmitted. The Apparitor's fee includes the preparation and delivery of the citations to the clergy and churchwardens, and the attendance at the visitation.

"A. C. Cantuar.
"Hatherley C.
"W. Ebor."

The table of fees printed in the *London Gazette* of June 2, 1908, contains the same fees in respect of the archdeacons' visitations as the table fixed in 1869 and the same notes or rules with respect to those fees as in that table with the following addition:

"Disbursements.—1. The fees include postages, telegrams, carriage and transmission of documents, office expenses, stationers' charges, and all other similar disbursements."

C. F. J.

1912
Nov. 11, 18;
1913
Feb. 5.

In the Estate of AMY HEATHCOTE.

Administration—Outstanding Grant—Letters of Administration not forthcoming—Loss or destruction—Additional Estate—Retractation of Renunciation—Fresh Grant to Person entitled—Practice as to Form of all Grants in future.

In future, all grants of letters of administration are to contain a personal undertaking by the administrator that the document shall be brought into the Principal Probate Registry if and whenever the administrator shall receive a formal notification that this is required to be done.

The deceased, a married woman, died in 1888 intestate, leaving her husband and one child surviving.

In May, 1889, the husband was adjudicated bankrupt, and in June, 1889, he renounced his right to take out letters of administration in respect of his deceased wife's estate.

In October, 1889, a grant of letters of administration was made to his trustee in bankruptcy.

In March, 1891, the bankruptcy was annulled, on payment by the bankrupt of 20*s.* in the pound.

In May, 1891, the trustee in the bankruptcy obtained his release as such trustee.

More than twenty years afterwards, a sum of about 700*l.* in personalty became payable to the legal personal representative of the deceased, and inquiries by the husband, who was beneficially entitled to this sum, and by his solicitor, elicited that the outstanding letters of administration could not be found, and that the same had been handed by the administrator to his successor in the office of official receiver in bankruptcy, and the latter stated that the document must have been destroyed with the file of the bankruptcy proceedings.

On a motion by the husband for leave to retract his renunciation, for revocation of the outstanding grant, and for a fresh grant of letters of administration to himself:—

The Court, in making the order, directed that in future every grant of letters of administration, whether issued to a person in his official capacity, or otherwise, shall contain a personal undertaking by the grantee that the letters of administration shall be brought into and lodged in the Principal Probate Registry, upon formal notification being given to the grantee at any time that this is required to be done.

This was a motion by Gerald William Yvery Heathcote, the husband of Amy Heathcote, deceased, for leave to retract his renunciation dated June 18, 1889; for revocation of letters of administration granted on October 1, 1889, to John Cornelius Moberly, of Southampton, the trustee in the bankruptcy of

1912

HEATHCOTE, IN THE ESTATE OF.

Gerald William Yvery Heathcote; and for a fresh grant of letters of administration to himself.

Amy Heathcote, the deceased, died on April 1, 1888, at Osborne House, Romsey, in the county of Southampton, intestate, leaving Gerald William Yvery Heathcote, her lawful husband, and Henry A. Y. Heathcote, her lawful son and only child, her surviving.

On May 6, 1889, a receiving order in bankruptcy was made against the husband, and on May 8, 1889, a summary order was made for administration in bankruptcy.

On May 22, 1889, he was adjudicated bankrupt.

On June 18, 1889, he formally renounced his right to take out letters of administration in respect of his deceased wife's estate.

On October 1, 1889, letters of administration of the deceased's personal estate and effects were granted to John Cornelius Moberly, the husband's trustee in bankruptcy.

On March 17, 1891, the bankruptcy was annulled on the payment by the said Gerald William Yvery Heathcote of 20*s.* in the pound.

On May 29, 1891, the said John Cornelius Moberly obtained his release as trustee in the said bankruptcy.

Under the will of the Reverend John Davies, deceased, a sum of about 700*l.* in personalty had now become payable to the deceased's estate, and the said Gerald William Yvery Heathcote, as the husband of the deceased, was the only person beneficially entitled thereto.

Mr. Moberly, who was a solicitor at Southampton, was communicated with by letter on October 14, 1912, and was asked by the husband's solicitor whether, as the administrator of the deceased's estate, he would collect and hand over the money, but his answer was as follows:—

"172, High Street,
"Southampton,
"15th October, 1912.

"Dear Sir,

"*G. W. Y. Heathcote.*

"I have long since ceased to be the official receiver in bankruptcy for this district and therefore conceive that I

1912

HEATHCOTE, IN THE ESTATE OF.

have nothing more to do with this matter, but that as I took out administration of the personal estate of Amy Heathcote, ex officio, the position of administrator passes to the present official receiver, Mr. Thomas Easton.

"I have not, however, got the grant of administration and am therefore unable to see whether this is so. If you have got the grant, and can therefore refer to the terms of it, you will probably be able to ascertain how the matter stands.

"Yours truly,

"J. C. Moberly.

"Arthur Pyke, Esqre.,

"24, Lincoln's Inn Fields, London, W.C."

It was pointed out, in answer, that the office of administrator does not pass; and Mr. Moberly thereupon suggested that it would be most convenient that his appointment as administrator should be annulled and that a fresh grant should be made, and he offered to concur in a motion to the Court for that purpose, and was willing that Mr. Pyke should act on his behalf.

In reply to a further request for production of the outstanding letters of administration, Mr. Moberly wrote: "I regret to say that I have not got the original grant of administration; and, on applying to the present official receiver in bankruptcy, I am told that the file has been destroyed."

On November 11, 1912, the present motion was brought before the Court, but it stood over for the learned judge to have a definite statement that Mr. Moberly had decided to have nothing more to do with the matter.

Mr. Moberly was again communicated with, and wrote in reply that he had "decided to have nothing more to do with the matter," adding: "The grant of administration was made to me for a specific purpose, which was at an end when the bankruptcy was annulled, and I cannot see that I can do any good by further meddling in the estate. It seems to me that it would really be less expensive to the estate to let the order, which you are applying for, go, than to obtain a duplicate grant to me in substitution for the original grant which has been lost."

On November 18, 1912, the motion was again before the Court, when the learned judge directed that the Court registrar should

1912

HEATHCOTE, IN THE ESTATE OF.

write to Mr. Easton to bring in the grant or to explain its non-production. The motion again stood over.

After further correspondence with Mr. Easton and with other persons, which resulted in the definite statement that the letters of administration were sent on February 8, 1890, to Mr. Moberly by the firm who, as his London agents, had extracted the same; that they were handed by Mr. Moberly, as already stated by the latter, to his successor in office; and that Mr. Easton, the present official receiver at Southampton, informed him that "they were probably destroyed with the file."

On February 5, 1913, the motion was renewed.

Durley Grazebrook, for the applicant.

BARGRAVE DEANE J. I am satisfied that this grant of administration cannot be found and that it has been destroyed, probably, as Mr. Easton has said, when the file in the bankruptcy was destroyed. There has been great carelessness on the part of Mr. Easton. Documents of this nature ought to be carefully preserved, if handed over by one official to his successor in office.

The notion that the office or position of administrator passes is quite erroneous: the grant of letters of administration is made personally to the applicant for the grant.

In view of the state of things disclosed in the course of this case, I direct that, in future, all letters of administration shall contain a personal undertaking by the grantee that he will bring the document into the Principal Probate Registry if and whenever he shall receive a formal notification requiring him to do so.

In the present case, I make an order that the applicant, Gerald William Yvery Heathcote, have leave to retract his renunciation; I revoke the grant made to Mr. Moberly, who was the official receiver in his bankruptcy; and I make a fresh grant of letters of administration in favour of the applicant.

Durley Grazebrook inquired whether the grant would be de bonis non or in general terms; and whether the direction which the Court had now given, in regard to grants hereafter issuing,

1913

HEATHCOTE, IN THE ESTATE OF.

was intended to apply only to grants made to persons in an official capacity.

BARGRAVE DEANE J. The direction is intended to be general; it can do no harm to have the undertaking inserted in all grants in future.

With regard to the other point, the form of the present grant should be in general terms: not merely de bonis non.

Solicitor: *Arthur Pyke.*

H. D. G.

1912
Nov. 4.

STATHATOS *v.* STATHATOS.

Divorce—Separate Domicil of Wife—Jurisdiction—Decree.

A woman, domiciled in England at the time of her marriage with a foreigner, may—after he has debarred her from claiming any relief in the Courts of his foreign domicil by obtaining there a decree of nullity—petition the Court of her own domicil, to which she has reverted, and may obtain a decree here dissolving her marriage.

In proper circumstances, the Court here ought to assume jurisdiction in the wife's suit for dissolution of marriage, by treating her as having a domicil of her own sufficient to support such a suit.

The dicta of Lord Gorell in *Ogden* v. *Ogden* (*otherwise Philip*) [1908] P. 46, at pp. 82, 83, adopted.

UNDEFENDED PETITION by the wife for dissolution of marriage on the grounds of desertion and adultery.

The petitioner alleged that she was domiciled in England, but the respondent was domiciled in Greece.

In the course of her evidence the petitioner stated that she was residing at Kensington. She said that she was born in France in 1877, and her uncle, with whom she now lived, brought her to this country about 1894, and she had lived here ever since, and had acquired property here. She had looked upon England as her home, and intended to remain there.

On July 21, 1904, she was married to Antonio Stathatos, the respondent, at the register office in the district of St. Giles, London. His father was a Greek merchant in Athens, and the respondent was over in this country on the business of his father's

firm. He had been living here for some eight or ten months before the marriage, and after the marriage the parties lived together in London until 1907, when they went to Athens. The petitioner was not introduced to her husband's father, nor did he treat her as he had done in England; in fact, he did not treat her there as his wife at all; and, at the end of that same year or the beginning of 1908, she returned to England in consequence of the respondent telling her to go back to her relatives.

Some time after she returned here the respondent sent her some money, but the remittances ceased after about five or six months. After that, she received neither letters nor money from the respondent.

The respondent instituted proceedings for nullity in Greece, and the papers in that suit were served upon the present petitioner, and on June 25, 1910, a decree of nullity was pronounced, which was expressed to be " in default of appearance "; this decree being also served upon her.

The ground for the decree appeared to be that, according to Greek law, there must be present at all marriages a Greek priest, and, as this marriage had taken place at a register office in London, and no priest was present thereat, the marriage was null and void; and that, as regards the validity of the marriage of a Greek subject, the law of the country of the husband applied.

On hearing through friends that her husband had married again, the petitioner consulted her solicitors, and the present petition was presented.

It appeared by affidavits, leave to read which had previously been given, that on April 21, 1911, the respondent married again at Athens, and afterwards lived with the lady whom he so married at an address in Athens. The deponents to these affidavits duly identified the man who had contracted the second marriage as being the same as the respondent in this present suit.

Barnard, K.C. (*W. O. Willis* with him), for the petitioner. The husband in this case, by obtaining his decree of nullity, has prevented his wife from going to live with him: he has

1912

STATHATOS v. STATHATOS.

prevented his wife from taking any proceedings whatever in the Greek Courts to get any relief, because the moment she applied to a Court in Greece the answer would be that that Court had no jurisdiction ; that there was no marriage, the ceremony in London having been declared null and void. Therefore, the petitioner, unless she can from the date of the decree of nullity claim to have acquired a domicil of her own, is without any remedy at all. There is nothing in the law of this country to prevent her from acquiring a domicil of her own, and the date when she can do so, it is submitted, is the date when the husband put it out of her power to prefer any claim against him in the country of his domicil. [He referred to the dicta in *Ogden* v. *Ogden* (*otherwise Philip* (1), *Dolphin* v. *Robins* (2), *Le Sueur* v. *Le Sueur* (3), and *Armytage* v. *Armytage*. (4)] Under these circumstances the Court is now asked to decide the question, and, in giving its decision, to go further than it has gone before. It is asked to say that, from the date of the Greek decree annulling the English marriage, the wife was entitled to set up and acquire a domicil of her own ; and that, as she has lived in this country since 1894, with the exception of part of the year 1907, which she spent in Greece, and as she has lived here ever since the decree of nullity, and intends to remain here, she is to be held to have acquired a domicil in England, and is entitled to a decree of divorce in this Court. How can it be said that she is domiciled in Greece ? According to the law of that country and the decree of the Court there, she never was the respondent's wife : according to the law of that country she has only been his mistress; that is virtually what the decree amounts to. There must be a way out of this case of hardship and difficulty.

The proposition that the wife's domicil is that of the husband is founded on dicta; and, on the other hand, there is a dictum shewing that the wife can acquire a separate domicil from her husband after there has been a decree.

Under these circumstances the Court is asked to say in this case that the wife has acquired a separate domicil, that she is

(1) [1908] P. 46.
(2) (1859) 7 H. L. C. 390, at p. 416.
(3) (1876) 1 P. D. 139.
(4) [1898] P. 178, at p. 185.

entitled to sue in this country, and that she is entitled to the relief which she prays for.

Bargrave Deane J. In this case the petitioner, who was a Miss Henry, married a Greek on July 21, 1904, in this country, at the register office, St. Giles, in the county of London. They lived together in this country until 1907. By the law of this country, that was a perfectly valid marriage; by the law of this country that gentleman, being a Greek subject and being still, as I believe, domiciled in Greece, although, at and after the date of the marriage, temporarily resident in this country as agent for his father, who was a shipbroker at Athens, retained his Greek domicil, but he and the petitioner lived together here. Then the husband, perhaps intentionally, took her over to Athens, treated her very badly, sent her back to this country in 1907, in fact deserted her for two years and upwards, and in 1911, according to the evidence before me, he married in Athens a Greek lady and lived with her in Athens. Now it turns out that before he married the second time he went before the proper Greek Court in Athens and procured a decree of nullity of marriage against this lady on the ground that, by the law of Greece, a Greek priest ought to have been present at the ceremony, and without his presence the ceremony was null and void, as there was no Greek priest present. That was established, and the Greek Court of course found that, by the law of Greece, the marriage was null and void; and thereupon the man married again and lived with his new wife. By English law the present petitioner was married, and thereupon acquired the husband's domicil. As it was not an English domicil, this Court had no jurisdiction to dissolve her marriage; and that rule has been observed until this last case of *Ogden* v. *Ogden* (*otherwise Philip*). (1) That case did not reverse the old rule of law, but Lord Gorell, who was the mouthpiece of the Court of Appeal in that case, suggested a way out of the difficulty, and said, in terms, that, in a particular case very like this, if the Court of first instance had had the argument presented to it which Lord Gorell thought might have been presented to it, and which is now presented

(1) [1908] P. 46.

BIBL. LONDIN

1912

STATHATOS v. STATHATOS.

Bargrave Deane J.

to me, the Court might have held that the lady was entitled to come to the English Court to get rid of her English marriage on grounds such as these.

The case of *Ogden* v. *Ogden* (*otherwise Philip*) (1) first came before Lord St. Helier in the form of a suit for divorce or alternatively, for a declaration that the marriage had been annulled, by the lady against her first husband Philip, and that petition was dismissed. Philip had returned to France and obtained a decree of nullity. The lady, who was English, afterwards contracted a second marriage with Ogden, and he thereafter came before me praying for a decree of nullity on the ground that Philip, the first husband, was alive, and that, by the law of England, her first marriage was valid. I went through the authorities very carefully, and decided in his favour, holding that the French decree of nullity obtained by Philip was of no effect here and that by English law the lady still remained the lawful wife of her first husband Philip. Ogden's case went, as I have said, to the Court of Appeal. It is undoubtedly the fact, a fact that one cannot shut one's eyes to, that a woman is put into a very difficult position sometimes when, having married in England by English law, and having thereby contracted, according to the law of this country, a valid marriage, her husband, being a foreigner with a foreign domicil, goes back to the country of his domicil and applies to the Courts of that country, and obtains a decree of nullity. In such cases the wife finds herself to be a wife in England, but no wife in the country of her husband.

Lord Gorell in the course of his judgment in the Court of Appeal suggested that this Court might, in such a case, dissolve the wife's marriage, and grant her relief, on grounds recognized here, upon the basis that the Court of the husband's domicil having deprived her of all claim upon her husband, and thereby relieved her of all obligation to observe the domicil of her husband, she reverted to her own domicil, and thereby acquired a right to sue in this Court for breaches of the marital relations committed by the husband.

I am now asked to exercise in this Court for the first time that suggested form of relief. It is undoubtedly giving the go-by

(1) [1908] P. 46.

to what has always been the rule of law and practice here, namely, that the wife's domicil is the husband's domicil whatever that may be. I should feel very much happier in the course I am going to take if I knew that my decision were going before the Court of Appeal, and that the higher tribunal would be in a position to deal with it and exercise their judgment upon it. But I always take my courage in my own hand, and act, so far as I can, according to what I feel and believe to be just and right. If I am wrong in what I am about to do in this case, I hope it will not be taken as a precedent, unless and until the Court of Appeal has had an opportunity of approving it.

I am going to pronounce a decree nisi. The dictum of Lord Gorell in *Ogden* v. *Ogden* (*otherwise Philip*) (1) appears to me unanswerable. I think that for an English woman, as Miss Henry the present petitioner was, domiciled here and married here, to be told that she is a wife in England, but no wife in Greece, the country of her husband, would be a disgrace both to our law and our practice. There must be a way out of it. The only way out of it is that which has been suggested. She became a Greek subject domiciled in Greece by her marriage with the respondent. The Greek Court has said No, we cannot recognize you; you must go back to your English domicil, and get what relief you can from the Courts of that domicil. She has come to this Court and asks for relief by virtue of her English domicil, which she says the Greek Court has thrown her back upon.

I may be wrong: the Court of Appeal through Lord Gorell may have been wrong in what they suggested; but it seems to me such good common sense and so just that, whether right or wrong, I am going to act upon it.

I pronounce a decree nisi on the ground of the husband's desertion coupled with his adultery in Greece since he left her and sent her back to this country.

Decree nisi with costs.

Solicitors: *Nussey & Fellowes.*

(1) [1908] P. 46.

H. D. G.

1913
Jan. 17.

SCOTT *v.* SCOTT.

Divorce—Petition—Definition of Collusion—Decree.

Collusion is an improper act done, or an improper refraining from doing an act, for a dishonest purpose.

Where a wife (petitioner), who had obtained a decree of judicial separation on the ground of desertion with permanent alimony at the rate of 160*l.* a year, informed her husband's brother, through whom it was paid, that the allowance was insufficient for the support of herself and her daughter, and was thereupon informed by him that, if she would institute proceedings for divorce, the necessary information for which would be supplied, her husband would pay her a sum of 300*l.* down on the filing of the petition, another 300*l.* on the decree being made absolute, and 500*l.* a year by way of permanent maintenance in lieu of 160*l.* a year theretofore paid as permanent alimony, the Court held that there was in the circumstances no misconduct on the part of the petitioner in consenting to these proposals, and pronounced a decree nisi accordingly.

Churchward v. *Churchward and Holliday* (*The Queen's Proctor intervening*) [1895] P. 7, distinguished.

This was an undefended petition by the wife on the ground of desertion and adultery.

The desertion had been proved, and on August 5, 1902, a decree of judicial separation had been pronounced.

In the present petition it was alleged inter alia that on June 19, 1904, and August 15, 1904, at the Carlton Hotel, London, the respondent committed adultery with a person unknown to the petitioner.

In the course of the opening and the petitioner's evidence the following facts, which it was submitted did not amount to collusion, were disclosed to the Court.

Following on the decree in the first suit an order was made in April, 1903, for permanent alimony at the rate of 160*l.* a year.

The petitioner and the only child of the marriage, a daughter, born in November, 1892, lived with the petitioner's mother down to August, 1911, when the mother died. The latter had helped to

support the petitioner and her daughter, but a pension of 700*l.* a year, upon which she had lived, died with her.

The petitioner had been receiving the alimony through a brother of the respondent. In the summer of 1912 she saw him and told him that she and her daughter could not live on the 160*l.* a year. He then said that she could get her income increased if she would do what the respondent wished, namely, institute proceedings for divorce, adding that the necessary information as to the respondent's adultery would be supplied, and that the respondent would pay her 300*l.* down on the filing of the petition for divorce, and would undertake to pay another 300*l.* on the decree being made absolute, and 500*l.* a year in place of the 160*l.* a year.

The petitioner was reluctant, but after having taken the advice of a lawyer she on his advice eventually consented to do as the respondent, through his brother, suggested.

The brother accordingly called upon the petitioner's solicitors and furnished them with the information of the respondent's adultery in 1904, evidence of which was then obtained, and the petition, dated July 24, 1912, was filed. The petitioner received the first sum of 300*l.* above mentioned.

Barnard, K.C. (*Newton Crane* with him), for the petitioner, referred to *Malley* v. *Malley* (1) and *Churchward* v. *Churchward and Holliday* (*The Queen's Proctor intervening*). (2) The only question is whether the facts disclosed amount to collusion, and it is submitted that they do not. The last-named case is distinguishable, because the arrangement there made involved the buying off of any defence. Even if collusion were established, it would not preclude the petitioner from filing another petition and praying for relief on the same grounds.

BUCKNILL J. In this case I can see no misconduct on the part of the petitioner. In considering whether there has been misconduct amounting to collusion one must be careful to consider the facts in each case, and here I find that having taken advice, and not being moved by any improper motive, she cannot be

(1) (1909) 25 Times L. R. 662. (2) [1895] P. 7.

1913

SCOTT v. SCOTT.

Bucknill J.

said to have colluded with the respondent so as to prevent her obtaining the decree of this Court.

Collusion may be defined as an improper act done, or an improper refraining from doing an act, for a dishonest purpose.

By the light of this definition, I find that there has been nothing which amounts to collusion in the present case.

The case of *Churchward* v. *Churchward and Holliday* (*The Queen's Proctor intervening*) (1) is distinguishable upon the facts.

I pronounce a decree nisi with costs and the custody of the child.

Solicitors: *Reid, Sharman & White.*

H. D. G.

1913

Jan. 20, 27.

THE OKEHAMPTON.

Admiralty—Collision—Damage—Time Charter—Sub-charter—Loss of Bill of Lading Freight.

The plaintiffs were sub-charterers of a steam vessel which, whilst on a voyage from Valencia to Hamburg with cargo, came into collision with, and was sunk by, the defendants' steam vessel. The defendants admitted that the collision was caused by the negligent navigation of their vessel, and agreed to a reference to the registrar and merchants of the plaintiffs' claim consisting of two items, namely: (1.) the bill of lading freight payable at Hamburg, less hire of the vessel and expenses which would have been incurred had the voyage been completed, and (2.) the value of bunker coal which would have been on board at Hamburg after completing the voyage.

The registrar allowed item No. 2, but disallowed item No. 1 on the ground that the claim was too remote. On appeal in respect of item No. 1:—

Held by Bargrave Deane J., that this item was properly disallowed, as, by the identical terms of the charter and sub-charter, though the sub-charterers had the use of the vessel for the voyage, the ship-owners remained in possession by their servants the master and crew,

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(1) [1895] P. 7.

and, therefore, the sub-charterers had no right of action against the defendants, who had paid the shipowners for loss of chartered freight, and as the shipowners had carried the goods for the sub-charterers, they alone were in a position to sue for the freight claimed by the sub-charterers.

MOTION in objection to the registrar's report.

The plaintiffs (appellants) were Robert MacAndrew & Co.

The defendants were the owners of the steamship *Okehampton*.

The plaintiffs claimed "as time charterers of the steamship *Ruggiero di Flores* for damages occasioned by and arising out of a collision which took place between the steamship *Ruggiero di Flores* and the steamship *Okehampton* in the North Sea on January 12, 1912."

As a result of the collision the *Ruggiero di Flores* sank. She was an Italian steam vessel and at the time was in the course of a voyage from Valencia to Hamburg (via Gibraltar) with a cargo of fruit and wine. She was under charter to C. A. Blom & Co., Limited, of Newcastle-on-Tyne, by whom she was sub-chartered to the plaintiffs, Robert MacAndrew & Co., of London.

By an agreement of settlement, dated October 3, 1912, "1. In consideration of the plaintiffs agreeing to the terms of settlement hereinafter set out, we the undersigned solicitors for the defendants hereby admit that the collision in question in this action was caused by the negligent navigation of the s.s. *Okehampton*. 2. The defendants agree to pay and the plaintiffs to accept 65 per cent. of such damages as the plaintiffs prove they have sustained and as are recoverable by them at law in view of the aforesaid admission, the defendants maintaining their contention that the plaintiffs, notwithstanding the negligent navigation of the s.s. *Okehampton*, have no right of action against them. 3. In the event of its being held that the plaintiffs are entitled to recover damages, the defendants also agree to pay 65 per cent. of the plaintiffs' taxed costs excluding any payment for detention of witnesses. 4. The solicitors for the plaintiffs and defendants respectively hereby consent to a reference to the registrar and merchants to deal with the questions arising on the above terms of settlement."

1913

THE OKE-HAMPTON.

The particulars of the plaintiffs' claim were as follows:—

	£ s. d.	£ s. d.	£ s. d.
Item No. 1:—			
To bill of lading freight payable at Hamburg		1506 19 1	
Less—			
(A) hire from the date of the collision to the estimated date of the termination of the voyage to Hamburg 3 days at £27 less 1¼ per cent. brokerage . .	80 0 0		
(B) expenses which would have been incurred at Hamburg had the voyage been completed .	223 19 11		
		303 19 11	
			1202 19 2
Item No. 2:—			
Bunker coal which would have been on board after completion of discharging at Hamburg—			
quantity on leaving Valencia for Gibraltar .	145 tons		
consumed in sailing to and at Gibraltar . .	32		
	113		
taken on board at Gibraltar . . .	80		
quantity on leaving .	193		
Less—			
quantity which would have been consumed if voyage to Hamburg completed—			
8 days steaming @ 16 T. per day .	128		
2 days in port Hamburg discharging @ 3 tons per day .	6		
	134		
59 tons at 21*s.* per ton . .			61 19 0
			£1264 18 2

The plaintiffs' time charter, dated December 27, 1911, ran as follows:—

"It is this day mutually agreed between Messrs. C. A. Blom

1913

THE OKEHAMPTON.

& Co. Ltd., Newcastle-on-Tyne, chartered owners of the Italian steamship called the *Ruggiero di Flores*, of 2297 tons gross register, 1433 tons nett register, provided with water ballast, 224 horse-power, classed 100 A.1, and carrying about 3400 tons dead weight cargo and bunkers on Lloyd's summer freeboard, including bunker capacity now trading. Cubic capacity about 161,830 feet grain, and Robert MacAndrew & Co. of London charterers, as follows :—

"That the said owners agree to let, and the said charterers agree to hire the said steamship for the voyage from Valencia to final discharging port in East Coast of U. K. or Continent between Havre and Hamburg inclusive from the time of delivery (not before January 2, 1912), she being then placed with clear holds at the disposal of the charterers at Valencia, Spain, in such dock, or at such wharf or place where she may always safely lie afloat as charterers may direct immediately on arrival (berth being ready) and being tight, staunch, strong, and in every way fitted for the service, and with a full complement of officers, seamen, engineers and firemen necessary for a vessel of her tonnage; to be employed in such lawful trades between any port or ports in Spain and/or Portugal to one or more ports of discharge in the United Kingdom and/or Continent of Europe between Havre and Hamburg (both inclusive) and back finally to the East Coast of United Kingdom or to a safe port on the Continent between Havre and Hamburg both inclusive, as charterers or their agents shall direct on the following conditions :—

"1. That the steamer has been dry docked, bottom cleaned and painted, before delivery under this charter, and subsequently to dry dock at intervals of nine months unless previously required by owners. All time and expense to be for owners' account.

"2. That the owners shall provide and pay for all the provisions and wages of the captain, officers, engineers, firemen and crew, shall pay for the insurance of the vessel, also for all stores, and maintain her in a thoroughly efficient state in hull, machinery, and equipment for and during the service, and supply ordinary gear for loading and discharging according to the custom of the

1913

THE OKE-HAMPTON.

respective trades, and shall maintain her in such condition during the service.

"3. That the charterers shall provide and pay for coals, canal dues, port charges, pilotages, consulages (except such as appertain to the crew), agencies, commissions, expenses of loading and unloading cargoes, and all other charges and expenses (whatsoever except those before stated) connected with the performance of this contract.

"4. That the charterers shall pay for the use and hire of the said vessel at the rate of £27 twenty-seven pounds sterling per running day commencing on and from the time of her delivery to charterers as aforesaid, during usual working hours, and at and after the same rate for any time used to complete a voyage: hire to continue from the time specified for commencing the charter until her re-delivery to owners (unless lost) at a port in the United Kingdom or on the Continent as aforesaid. Should steamer be likely to complete her voyage soon after hire is due charterers can pay a sum estimated to cover remainder of the voyage any surplus or deficit to be regulated on completion.

"5. Payment to be made in cash weekly in advance in Newcastle-on-Tyne to Messrs. C. A. Blom & Co. Ltd. and in default of such payment or payments as herein specified, the owners shall have the faculty of withdrawing the said steamer from the services of the charterers without prejudice to any claim they (the owners) may otherwise have on the charterers in pursuance of this charter.

"6. That should the steamer be tendered to or by charterers after 12 o'clock (noon) time not to count until 6 A.M. on the following day and if on Saturday not until 6 A.M. on the following Monday; legal holidays also mutually excepted.

"7. That the charterers shall accept and pay for all coal in ship's bunkers at time of delivery, and the owners shall on the expiration of this charter-party pay for all coal then left in the bunkers at current market price at the respective ports of delivery and re-delivery.

"8. That the cargo or cargoes shall be laden and/or discharged in any dock, or at any wharf or place that charterers may direct,

1913

THE OKE-HAMPTON.

where she can always safely lie afloat, or in such docks or wharf where steamers of similar size and draught are accustomed to safely load and discharge, touching ground.

"9. Steamer to work night and day if required. All steam winches and a full supply of steam for same to be available during loading and discharging, and steamer to provide men to work winches both day and night if required. All overtime to be paid by charterers. In the event of steamer's donkey boilers not being able to supply sufficient steam to drive all the winches at the same time, then the main boilers shall be used, if required by the charterers.

"10. That the whole reach, burthen, passenger accommodation (if any) and deck space (compatible with vessel's seaworthiness) of the ship, not being more than she can reasonably stow and carry, but not less than her full deadweight capacity shall be at the charterers' disposal, reserving only proper and sufficient space for ship's officers, crew, tackle, apparel, furniture, provisions and stores.

"Deck cargo to be carried entirely at charterers' risk and expense.

"11. That the owners shall not be responsible for damage to cargo caused by bad stowage, the stevedores being employed by the charterers.

"12. That the captain shall prosecute his voyage with the utmost despatch, and shall render all customary assistance with the ship's crew, winches and boats, and shall drive winches and shift ship to load and/or bunker, and proceed to sea when ordered, if tide and weather permit.

"13. That the captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment, agency or other arrangements; and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading, or in otherwise complying with the same, or from any irregularity in ship's papers, committed by charterers or their agents.

"14. That if the charterers shall have reason to be dissatisfied with the conduct of the captain, officers or engineers, the owners

1913

THE OKE-HAMPTON.

shall on receiving particulars of the complaint, investigate the same, and, if necessary, make a change in the appointment.

"15. That the master shall be furnished from time to time with all requisite instructions and sailing directions, and shall keep a full and correct log of the voyage or voyages, which shall be exhibited to the charterers or their agents when required.

"16. That in the event of loss of time from deficiency of men or stores, or from any defect or breakdown of or repairs to machinery, or damage or accident preventing the working of the vessel for more than twenty-four consecutive hours, the payment of hire shall cease from the commencement of such loss of time until she be again in an efficient state to resume her service at the point or place where she was withdrawn from the service; but should the vessel be driven into port, or to an anchorage by stress of weather, or from any accident to the cargo, such detention or loss of time shall be at the charterers' expense.

"17. That should steamer be detained by ice, such detention shall be for charterers' account, and the time shall count unless resulting from breakdown of or accident to ship and/or machinery.

"18. That should the vessel be lost, the hire is to cease and determine on the day of her loss, or if such should be unknown then on the day when she was last spoken, and any hire paid in advance and not earned shall be returned to the charterers without delay.

"19. The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates and thieves, arrest and restraints of princes, rulers and people, collisions, stranding, and other accidents of navigation excepted, even when occasioned by negligence, default or error in judgment of the pilot, master, mariners, or other servants of the shipowner.

"20. Steamer to have liberty to be towed, also to tow and/or assist vessels in all situations, and to deviate for the purpose of saving life and property, also to coal at any ports in any order, and to sail with or without pilots.

"21. Ship not answerable for losses through explosion, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull, not resulting from want of due diligence by

1913

THE OKE-HAMPTON.

the owners of the ship, or any of them, or by the ship's husband or manager.

" 22. No goods contraband of war to be shipped, and the steamer not to be required to enter any port that is in a state of blockade or where hostilities are in progress. In the event of a country to which steamer trades being at war with any other country, charterers agree to insure the steamer against all war risks for the value under the present policy. But this not to apply to Italian ports. No voyage to be undertaken, or goods or cargoes loaded that would involve risk of seizure, capture or penalty by British or foreign rulers or government. Quarantine to be entirely at charterers' risk.

" 23. Charterers to have the liberty of sub-letting part or whole of the vessel's capacity, and the captain to sign bills of lading at any rate of freight without prejudice to this charter-party, but the charterers to remain responsible to the owners for due fulfilment of same.

. . . . .

" 25. That the owners shall have a lien upon all cargoes, and all sub-freights for freight or charter money or any other sums due under this charter ; and charterers to have a lien on the ship for all moneys paid in advance and not earned.

" 26. All derelicts, salvages and towages, after paying crew's proportion, wages and expenses, also charterers' hire, coals and expenses, for owners' and charterers' equal benefit.

" 27. General average (if any) shall be adjusted according to Y/A. Rules, 1890.

" 28. That should the steamer not be delivered as provided herein before noon of the 20th day of January, 1912, charterers shall have the option of cancelling this charter.

" 29. Penalty for non-performance of this contract proved damages.

" 30. That should any dispute arise between the owners and charterers, the matter in dispute shall be referred within thirty days from notification of claim to three persons in London conversant with time charters (not lawyers) one to be appointed by each of the parties hereto, and the third by the two so chosen ; their decision or that of any two of them, shall be final and binding,

1913

THE OKE-HAMPTON.

and for the purpose of enforcing any award, this agreement may be made a rule of court.

"31. A commission of five per cent. (5 °/₀) on the estimated gross amount of freight is due by the owners or other disponents of the steamer to John Bovey & Co., on the signing of this charter-party and any continuation subsequently arranged by either party at above or any other rate and on above or any other conditions, ship lost or not lost.

"32. Should the captain require funds for owners' disbursements at any ports, charterers or their agents to advance same subject to interest at rate of 2½ °/₀, deducting such advances from first following payment of hire.

"33. All graving dock charges to be at owners' expense. Time in graving dock not to count on hire.

"34. Charterers not to be liable or held responsible for collision or damage done by the steamer in any way during the currency of this charter, nor are charterers responsible for compensation to crew for accidents."

In consolidated actions brought by the owners of cargo of the *Ruggiero di Flores*, and others, against the owners of the steamship *Okehampton*, the assessment of the amount of damage sustained was referred to the registrar and merchants. The learned registrar, with reference to the claim made by the owners of the *Ruggiero di Flores* for loss of freight, gave, on August 2, 1912, the following "reasons" for the sums allowed:—

"In this reference there were cross-claims in respect of a collision between the *Ruggiero di Flores* and the *Okehampton* on January 12, 1912. The only point, to which it is desirable to refer in particular, is the claim for loss of freight by the plaintiffs, the owners of the *Ruggiero di Flores*. This vessel was totally lost. At the time of her loss she was engaged under a time charter for twelve months, made on November 28, 1911, under which she began to work in January, 1912. A claim was made for the loss of the freight which would have been earned under this charter. The basis of this claim is, under recent decisions, correct, but I am of opinion that when the damages—which include the value of the lost ship—are paid, before the time at

which work under the charter would have ended, the plaintiffs cannot recover loss of freight beyond the date of such payment. From that moment they are in possession of the capital sum on which they can obtain interest or by means of which they are able to earn freight, and if they were to receive the freight beyond this period they would be receiving both interest on their capital and its equivalent. Interest on the value of a ship totally lost ceases on payment of the capital sum and loss of freight is on the same footing as interest. As stated in *The Racine* (1), contingencies also must be taken into account and twelve days' freight paid be deducted. The loss of freight has therefore been assessed on the above-stated principle."

The amount allowed the owners of the *Ruggiero di Flores* as her value was 7000*l.*, and freight 1980*l.*

With reference to the claim of the appellants as time charterers of the steamship *Ruggiero di Flores*, the learned registrar, on December 7, 1912, reported as follows:—

"The plaintiffs were the sub-charterers of the *Ruggiero di Flores* under a charter dated December 27, 1911. The charterers of the ship were Messrs. Blom & Co., under a charter of November 28, 1911. The plaintiffs took delivery of the ship at Valencia. There and at Carthagena she was loaded with fruit under bills of lading, and it is in respect of the loss of freight payable at Hamburg under these bills of lading that the present claim is made, as also for loss of bunker coals. On July 30 and 31, 1912, the claim of the owners of the *Ruggiero di Flores* and the owners of the cargo came before the merchants and myself, and a report was made by which the plaintiffs in those references were awarded damages, including the loss of hire of the *Ruggiero di Flores* under the first charter and the loss of bunkers belonging to the charterers.

"The latter head of claim was, at the first reference, admitted except as to price by the defendants. But it has now been proved that the bunker coals were the property of the sub-charterers. They are, therefore, now entitled to recover in respect of them.

"As regards the main head of claim, it was contended by counsel

(1) [1906] P. 273.

1913

THE OKE-HAMPTON.

for the defendants that it ought not to be allowed because it was too remote. In my opinion this claim cannot be allowed. An action arising out of a collision must be for damage done by a ship (Admiralty Court Act, 1861, s. 7), that is to a thing or person. The owners of the ship have already recovered the damages due to them for the damage to their ship. A loss arising to persons having only a contract with charterers of the ship, even though such contract is for the hire of the ship, is too remote as an element of damages in respect of the damage done to a ship the property of other parties. This is the first case so far as I can find, and as counsel also stated, of a claim at a reference by charterers for the loss of freight only. It was said on behalf of the plaintiffs that *The Thyatira* (1) was an authority in their favour, but in that case the plaintiffs were holders of a bill of lading and recovered a sum in respect of the enhanced value of the cargo at the port of destination.

"The point in my opinion is covered by the decision of Hamilton L.J. in *Société Anonyme de Remorquage à Hélice* v. *Bennetts* (2), and this claim is in fact an attempt to override the decision of the House of Lords in *Simpson* v. *Thomson* (3), in which the proposition was negatived that when damage is done by a wrong-doer to a chattel, all those who by contract with the owners of the chattel have bound themselves by obligations which are rendered more onerous or have secured to themselves advantages which are rendered less beneficial by the damage done to the chattel have a right of action against the wrong-doer. The cases of *The Racine* (4) and *The Kate* (5), which were cited for the defendants, merely decide that if a ship is sunk or damaged through the negligence of another, the owners of the damaged ship can recover in addition to the value of the ship the loss of profits through being deprived of the chattel.

"The plaintiffs' claim for the bill of lading freight must therefore be disallowed. As the plaintiffs have failed on this head but succeeded as regards the bunker coal, each party should pay their own costs of the reference and a moiety of the reference fees."

(1) (1883) 8 P. D. 155.
(2) (1910) 16 Com. Cas. 24.
(3) (1877) 3 App. Cas. 279
(4) [1906] P. 273.
(5) [1899] P. 165.

1913

THE OKE-HAMPTON.

The defendants having consented to the appeal being heard by way of motion, the plaintiffs, on December 18, 1912, gave notice of an application to the Court for an order that "the report of the registrar and merchants herein, disallowing the plaintiffs' claim for loss of freight, be rejected and not confirmed, and that the sum of 1202*l.* 19*s.* 2*d.* claimed or such other sum for loss of freight as to the Court may seem just be allowed on the grounds:—

"(1.) That on the facts proved or admitted at the reference the steamship *Ruggiero di Flores* was run into by the steamship *Okehampton* owing to the negligent navigation of the *Okehampton* by the defendants or their servants, and in consequence of the said collision the *Ruggiero di Flores* and her cargo sank and were totally lost; and that in consequence thereof the freight payable on delivery of the said cargo which the ship and the plaintiffs were in process of earning at the time of the collision was lost; and that the freight so lost, after deducting the expenses of earning it which had not already been incurred, amounted to 1202*l.* 19*s.* 2*d.*;

"(2.) that the said freight belonged to or was lost by the plaintiffs;

"(3.) that the plaintiffs were entitled to bring or maintain the action;

"(4.) that the registrar's report is wrong in law;

and for an order that the defendants pay to the plaintiffs the costs of the reference and the costs of and incidental to this motion."

1913. Jan. 20. *Batten, K.C.*, and *C. Robertson Dunlop*, for the motion in objection to the registrar's report.

Roche, K.C., and *Lewis Noad*, contra.

The arguments of counsel sufficiently appear from the registrar's report, above set out, and, in addition to the cases mentioned therein and in the learned judge's judgment, the following were referred to. By counsel in support of the motion: *The Winkfield* (1); *The Bailiffs, &c., of Dunwich* v. *Sterry* (2); *The Master, &c.*,

(1) [1902] P. 42.

(2) (1831) 1 B. & Ad. 831.

1913

THE OKE-HAMPTON.

of the Trinity House v. *Clark* (1); *Colvin* v. *Newberry & Benson* (2); *Sir John Jackson, Ld.* v. *Owners of s.s. Blanche* (3); *Belcher* v. *Capper* (4); Carver's Carriage by Sea, 5th ed., ss. 114, 116, 158; Maritime Conventions Act (1 & 2 Geo. 5, c. 57), s. 1, sub-s. 1.

By counsel contra: *Baumvoll Manufactur von Carl Scheibler* v. *Furness* (5); *Manchester Trust* v. *Furness, Withy & Co.* (6); *Wehner* v. *Dene Steamshipping Co.* (7); *Weir* v. *Union Steamship Co.* (8); *Cattle* v. *Stockton Waterworks Co.* (9); Carver's Carriage by Sea, 5th ed., s. 112.

Cur. adv. vult.

Jan. 27. BARGRAVE DEANE J. In this case the plaintiffs seek to recover from the defendants by action the sum of 1202*l.* 19*s.* 2*d.*, as part of the damages occasioned to them by the sinking of the steamship *Ruggiero di Flores* through collision with the defendants' steamship *Okehampton.*

There is no dispute that the collision was caused by negligence on the part of the *Okehampton.* The amount of the claim is not in dispute, but on a reference to the registrar he has disallowed the claim altogether on the ground that the plaintiffs, though charterers of the *Ruggiero di Flores*, were not her owners, and that, therefore, their claim being for freight in respect of goods carried by them in that ship and lost by reason of the collision with the *Okehampton*, could not be recovered as damages by them, they not being the owners of the ship which earned the freight.

The real owners of the *Ruggiero di Flores* had, on November 28, 1911, by the provisions of a time charter handed her over with her crew to Messrs. Blom & Co., and they in turn, by a charter-party dated December 27, 1911, handed her over to the plaintiffs, with her crew.

There can be no doubt that, by a charter-party, sometimes the ship herself and the control over her working and navigation are transferred to the persons who for the time being use her.

(1) (1815) 4 M. & S. 288.
(2) (1832) 1 Cl. & F. 283.
(3) [1908] A. C. 126.
(4) (1842) 4 Man. & G. 502.
(5) [1893] A. C. 8.
(6) [1895] 2 Q. B. 282.
(7) [1905] 2 K. B. 92.
(8) [1900] A. C. 525.
(9) (1875) L. R. 10 Q. B. 453.

Sometimes a charter-party is made for the purpose of securing to the charterer the use merely of a ship for a particular voyage or series of voyages. He does not desire to interfere with the manner in which she is to be navigated, nor is the shipowner willing to part with his control over her. The charterer is content with the owner's undertaking that the vessel's services shall be at his disposal. The whole control and management of the ship are left undisturbed in the hands of the owner, who remains in possession by his servants, the master and crew. In such a case the shipowner is the carrier of the goods for the charterer. It is, therefore, important to look at the terms of the charter-party and to study its terms, so as to ascertain the true position of the charterer in this case.

It is agreed that the original charter-party between the owners and Blom & Co. is identical in its terms with the charter-party between Blom & Co. and the plaintiffs, except as to the dates, which are not material. Blom & Co. agree to let and Robert MacAndrew & Co. agree to hire the said steamship for the voyage from Valencia to final discharging port on east coast of United Kingdom or Continent between Havre and Hamburg inclusive—ship being placed with clear holds at the disposal of the charterers at Valencia, Spain, in such dock, wharf, or place as the charterers may direct, with a full complement of officers, seamen, engineers, and firemen; that the owners shall provide and pay for all the provisions and wages of the captain, officers, engineers, firemen, and crew, for the insurance of the vessel and for all stores, and maintain her in a thoroughly efficient state in hull, machinery, and equipment during the service; the charterers to pay for the use and hire of the said vessel at the rate of 27*l.* per running day; payment to be made in cash weekly, and in default the owners to have the faculty of withdrawing the vessel from the services of the charterers; steamer to work night and day if required; the captain shall render all customary assistance with the ship's crew; the captain shall be under the orders and direction of the charterers as regards employment, agency, and other arrangements, but the charterers to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading or from any irregularity in ship's papers

1913

THE OKEHAMPTON.

Bargrave Deane J.

committed by the charterers or their agents; that if the charterers shall have reason to be dissatisfied with the conduct of the captain, officers, or engineers, the owners shall investigate the same, and, if necessary, make a change in the appointment; all graving dock charges to be at owners' expense, and time in graving dock not to count on hire.

Can it be said that the provisions of this charter-party shew that the owners ceased to be owners in possession, and that the charterers became the owners in possession? In my opinion the owners never intended to part with the control of their vessel, except to permit her to be used by the charterers for the temporary purpose of this defined voyage from Valencia to a port of discharge in the United Kingdom or Continent between Havre and Hamburg inclusive. This voyage was to be conducted by their own servants, the master and crew, and though the arrangements for the cargo carried and the freight to be paid were left in the hands of the charterers, the owners remained the real carriers and the actual possession of the ship still remained in them.

I have no doubt that this is the true meaning and intention of the charter-party, and that the owners, as carriers, were alone in a position to sue for the freight, and that the charterers were not, in point of law, the real carriers of the cargo and therefore cannot sue for the freight.

I am not aware of any case exactly like this which has been decided. Lord Gorell in *The Amstelstroom* had a similar point taken, but he did not decide it. (1)

(1) THE AMSTELSTROOM.

Collision—Damage—Time Charter.

In the early morning of October 10, 1904, a collision occurred in the river Humber between the Norwegian steamship *Turbin*, lying at anchor in the course of a voyage from London to Goole, and the Dutch steamship *Amstelstroom* from Amsterdam to Goole. On October 19, in an action brought by the owners of the *Turbin*, an admission of liability for the damage sustained was filed on behalf of the owners of the *Amstelstroom*. On October 25 an action in rem was commenced by the plaintiffs, Scott & Co., time charterers of the *Turbin*, against the defendants, the owners of the *Amstelstroom*, in respect of alleged loss resulting to them from the collision, and the *Amstelstroom* was arrested at Goole, but released on bail. On November 7 the defendants moved the Court to set aside the writ in the action

In my opinion the charterers should have placed this claim before the owners after the vessel was lost in the collision, and requested them to include it in their claim for damages in the action which they brought against the owners of the *Okehampton* for the loss of their ship the *Ruggiero di Flores*. Apparently this was not done, and the plaintiffs have no right of action against the defendants.

I confirm the registrar's report, with costs.

Solicitors for appellants (plaintiffs): *Trinder, Capron & Co.*

Solicitors for respondents (defendants): *William A. Crump & Son.*

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on the ground of want of jurisdiction, alleging (1.) that, at the time of the collision, though under a time charter, the *Turbin* was in the possession and control of her owners, (2.) that the alleged damage was not "damage done by any ship" within the meaning of the Admiralty Court Act, 1861, s. 7, and (3.) that they, the defendants, were not domiciled or ordinarily resident in this country.

According to an affidavit, filed on behalf of the plaintiffs, the *Turbin* was, when damaged by the collision, running, in a regular trade between Goole and London, under a profitable time charter, dated January 30, 1904, made between the plaintiffs and the owners of the *Turbin* for a limited period with an option, in favour of the charterers, for renewal up to twenty-four months in all, that the engagements as to freight made by the plaintiffs involved, whilst the *Turbin* was under repair, the employment of other steamers at an increased rate of hire, and further that expense had been incurred in the removal from the *Turbin* of bunker coal owned by them.

Aspinall, K.C., and *M. Hill*, for the defendants in support of the motion.

Laing, K.C., and *Dawson Miller*, contra.

Nov. 8. GORELL BARNES J. held that it was not necessary, at that stage, to decide the doubtful question whether the plaintiffs, as charterers, had a right of action against the other vessel or her owners in respect of their alleged profits, under the charter-party, lost as a result of the collision, for the writ could not be set aside, as there was a prima facie case sufficient to support the writ, in respect of the expenses and delay incurred by the plaintiffs in removing the bunker coal belonging to them on board at the time of the collision.

Solicitors: *Cattarns & Co.; Stokes & Stokes.*

(See *Shipping Gazette*, November 9, 1904.)

T. L. M.

THE COUNSELLOR.

1913

Jan. 21, 22. *Admiralty—Collision—Fog—"Moderate" Speed—Regulations for Preventing Collisions at Sea, art.* 16.

As a general rule a steam vessel ought not to be going so fast in a fog that those in charge of her cannot pull up within the distance that they can see.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the owners of the steamship *Camdale*, and her master and crew proceeding for the loss of their clothes and private effects.

The defendants were the owners of the steamship *Counsellor*.

The case is reported on the question of speed, under art. 16 of the regulations for preventing collisions at sea, by which "Every vessel shall, in a fog, go at a moderate speed, having careful regard to the existing circumstances and conditions . . . ."

On November 5, 1912, about 9.40 A.M., the weather being foggy with a light westerly wind, the screw steamship *Camdale*, of 1760 tons net register, and 312 feet in length, was in the Bay of Biscay in about latitude 45° 35′ north, and longitude 8° 48′ west, on a voyage from Cardiff to Civita Vecchia with a cargo of coal, and manned by a crew of twenty-three hands all told. She was making about 2½ knots on a S.W. magnetic course, and was sounding the regulation prolonged blast for fog, when a long blast was heard on the port bow from the whistle of a steamship which proved to be the *Counsellor*, a vessel of 3176 tons net register, and 400 feet in length, from Calcutta to Liverpool with a general cargo, and manned by a crew of sixty-five hands all told. She was steering N. 17° E. true, and her engines were working at slow, which gave a speed at the material time (as the Court found) of about 4½ knots.

According to the plaintiffs' statement of claim, on hearing the whistle of the *Counsellor*, "the engines of the *Camdale* were at once stopped and the whistle was sounded a long blast in reply and the helm was ported a little and then steadied. Shortly afterwards another long blast was heard and the *Camdale* replied with a long blast. Shortly afterwards the *Counsellor* came in sight about three to four lengths distant and about 2½ to 3

points on the port bow. The engines of the *Camdale* were at once put full speed astern and three short blasts were sounded and this signal was afterwards repeated. The *Counsellor* however came on at high speed although sounding three short blasts and with her stem struck the *Camdale* a very heavy blow on the port quarter cutting into her and causing so much damage that she (some hours) afterwards filled and sank. Just before the collision when it could be seen that the *Camdale* in case of a collision would be struck aft the engines of the *Camdale* were put full speed ahead in the hope that her stern would be brought clear and a long blast was sounded on the whistle."

By their defence, and counter-claim, the defendants alleged that on hearing a long blast on the whistle of a steamship on the starboard bow, which proved to be the *Camdale*, "the engines of the *Counsellor* were at once stopped. Then two short blasts followed quickly by three short blasts from the *Camdale* were heard and at the same time the *Camdale* came in sight a quarter to half a mile distant and about three points on the starboard bow. The engines of the *Counsellor* were at once put full speed astern and three short blasts were sounded and this signal was afterwards repeated. The *Camdale* came on swinging rapidly under a port helm and with her port quarter struck the stem of the *Counsellor* heavily causing serious damage. Just before the impact the helm of the *Counsellor* was put hard-a-port in order to help the *Camdale* to clear if possible but without effect."

1913. Jan. 21, 22. *Bateson, K.C., C. Robertson Dunlop,* and *A. Bucknill,* for the plaintiffs, the owners of the *Camdale* and others.

Roche, K.C., and *A. R. Kennedy,* for the defendants, the owners of the *Counsellor.*

In respect of the speed of the *Counsellor*, *The Campania* (1) (referred to in the judgment) and the cases therein mentioned were cited. On the question of the *Camdale* porting, before the position of the other vessel was ascertained, the cases of *The Vindomora* (2) and *The Castleventry* (3) were referred to.

(1) [1901] P. 289. (2) [1891] A. C. 1.
(3) *Shipping Gazette,* April 16, 1904.

1913

THE COUNSELLOR.

BARGRAVE DEANE J. In this case a collision took place in the Bay of Biscay on the morning of November 5 last between the steamer *Camdale*, of 2746 tons gross, proceeding to the south-west, and the *Counsellor*, a large vessel, of 4957 tons gross, proceeding north. The collision took place in a fog, and both vessels had experienced fog, on and off, before this particular time.

The first point which I must decide—because it seems perfectly clear from the documents and evidence—is that the *Counsellor* was going too fast. We have got this data to go upon, that the log shewed 225 miles, and we have got to deduct from that sixty-one miles so as to start from a given point, which the master has clearly given us, namely, a point abreast of Finisterre. He says that from there he went north some thirty miles, and then altered his course to E. of N. up to the place of collision. He got that bearing abeam of Finisterre at 5.41 on the afternoon of November 4, and therefore he went 164 miles from 5.41 on November 4 to about 9.40 on the morning of the 5th—that is, a little over sixteen hours to do the distance, which gives an average speed of ten miles an hour, approximately. During that time he was going at various speeds—full speed, stand-by (which would reduce full speed by a knot), half speed (about seven or eight knots), and slow (which is given as $4\frac{1}{2}$ knots). He was going slow during that period for four hours and twenty minutes, and that makes him do the balance of 145 miles in eleven hours forty minutes. That is at the rate of thirteen knots an hour. Now, the *Counsellor's* full speed is only twelve knots, and therefore we have not got the real truth either as to the speed of the vessel or her movements and the particular speeds at which she went at various times. It is admitted now that she was going $4\frac{1}{2}$ knots up to the time, just before the collision, when she sighted the *Camdale*. The Elder Brethren and I have consulted about this, and they advise me, and I am clearly of the same opinion, that that is too fast.

I think a very fair rule to make is this, and it is one which has been suggested to me by one of the Elder Brethren: You ought not to go so fast in a fog that you cannot pull up within the distance that you can see. If you cannot see more than

400 feet you ought to be going at such a speed that you can pull up. If you are going in a fog at such a speed that you cannot pull up in time if anything requires you to pull up, you are going too fast. If you cannot retain steerage way at such a speed, then you should manage by alternately stopping and putting the engines ahead.

In my opinion 4½ knots was in the circumstances of this case too great a speed for the *Counsellor* to proceed at. I have in my mind, of course, the case of *The Campania* (1), a vessel which ran down another in the Mersey, and the observations of the Court in that case.

There is one other point which counsel for the plaintiffs touched upon, which also leads one to the opinion that the vessel was going faster than we have been told, because she only heard one long blast from the *Camdale*. That is a very odd thing—and those in charge say that from the time they heard that blast to the collision was only a minute. It is very difficult to believe she was only going at the speed her witnesses say. Of course, if she was going at a greater speed she would be further off at the time she heard that blast. I am of opinion that the *Counsellor* is to blame for the collision by reason of going too fast at the time in the weather which prevailed.

Now I turn to the *Camdale*. As far as one can judge from the evidence and documents produced, she was being carefully navigated up to the time she heard the whistle of the *Counsellor* in the fog. What did she then do? I have got the chief officer's log here, and he was on deck at the time; and he also was in a position to consult the master and second officer at the time he wrote up the log; and it is said he did get information from them. He said: "9.33, heard whistle ahead, ported helm and stopped engines." It struck me at once that that is not obedience to the rule. The rule says that when a vessel in a fog hears the whistle of another vessel forward of her beam she shall stop her engines at once and then proceed to navigate with caution. How can you navigate with caution if, before doing anything at all to ascertain where the other vessel is whose whistling is heard, you port your helm? In my opinion in this particular case that

(1) [1901] P. 289.

1913

THE COUNSELLOR.

Bargrave Deane J.

porting of the helm was undoubtedly one cause of this collision. The *Camdale* threw herself across the bows of this other vessel, which had been proceeding in an almost exactly opposite direction, and then could not get out of the way. She tried to get out of the way by putting her engines full speed ahead, but that was only done at the last moment for the purpose of avoiding the consequences, and she failed.

In my opinion both vessels are to blame; one vessel for going too fast in fog, and the other for not shewing proper seamanlike regard to the rule which says that, hearing another vessel's whistle, you must proceed with caution. In my opinion there was no caution shewn at all by the *Camdale*. She took upon herself to port her helm without any inquiry and without waiting to hear another blast and to ascertain where the other vessel was, and in my opinion that porting contributed to the collision.

Both vessels being to blame, I have the unpleasant duty of having to construe the Maritime Conventions Act, 1911 (1), and in my opinion the fair decision will be that two-thirds of the damage shall be paid by the *Counsellor* and one-third by the *Camdale*.

Solicitors for the plaintiffs, the owners of the *Camdale* and others: *Thomas Cooper & Co.*

Solicitors for the defendants, the owners of the *Counsellor*: *Pritchard & Sons, for Simpson, North, Harley & Co., Liverpool.*

(1) 1 & 2 Geo. 5, c. 57.

T. L. M.

N. *v.* N. (1)

1913
Feb. 18.

Divorce—Practice—Pleading—Wife's Petition for Judicial Separation—Answer by Husband alleging Adultery and claiming Damages.

A husband, in answer to his wife's petition for judicial separation, which he resists on the ground of her adultery, may claim damages against the alleged adulterer. A separate petition is not necessary.

An answer in this form having been rejected in the Divorce Registry, the judge in chambers, upon an ex parte application, directed the same to be accepted and filed as originally tendered.

Application, ex parte, in chambers, for leave to file the answer of the respondent as it stood, the same having been refused in the Registry, first by one of the subordinate officials and afterwards by one of the registrars.

The facts, so far as material, were as follows:—

The wife had formerly petitioned for the dissolution of her marriage on the grounds of the alleged adultery and cruelty of her husband, who thereupon, by act on petition, successfully challenged the jurisdiction of this Court on the question of his domicil.

Thereupon the wife obtained leave to amend the prayer and asked for a decree of judicial separation.

The husband then sought to file an answer to the amended petition, traversing the wife's allegations, and, alleging that she had committed adultery with a certain man (named), claimed damages against the alleged adulterer; and the husband prayed the Court to dismiss the wife's petition and to direct that the damages be assessed by a jury.

The officials at the Divorce Registry refused to allow the answer to be filed, on the ground that it was contrary to the practice, because the claim for damages should be the subject of a separate petition.

Rayden, for the respondent, applied in chambers, ex parte, for a direction that the answer should be accepted as it stood and should be filed accordingly in the Divorce Registry.

(1) Ex relatione W. Rayden, Esq., barrister-at-law. Reported by leave of Sir Samuel Evans, President.

1913

N. *v.* N.

Sir Samuel Evans, President (in chambers), having read s. 33 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), which deals with claims for damages, and having considered the meaning to be attached to the word "petition"; having also read s. 22 of the same Act, which relates to "all suits and proceedings other than proceedings to dissolve any marriage," and having compared it with s. 2 of the Matrimonial Causes Act, 1866 (29 & 30 Vict. c. 32), which deals with "any suit instituted for dissolution of marriage," and having considered the practice of the Ecclesiastical Courts as to granting relief to an original libellant; and having ascertained that a considerable saving of expense would be effected, acceded to the application of counsel for the respondent; and directed that the delivery of a copy of the answer to the wife's solicitors should be deemed sufficient notice to her.

Solicitors for the applicant (respondent): *F. O. Chinner & Co.*

H. D. G.

Applied. Scott *v.* Scott [1951] P. 193

Applied. Scott *v.* Scott. [1950] 2 All E.R. 1154.

1913

Feb. 24.

BURMESTER [*v.* BURMESTER.

Divorce—Permanent Maintenance—Injunction—No Subsisting Order—Practice.

The Court, upon a petition for permanent maintenance, and before any specific sum has been made payable by a subsisting order, has no power to grant an injunction, at the instance of a wife, restraining her husband from dealing with his property which may ultimately be affected under a petition for permanent maintenance; and the same principle applies to an application for permanent alimony.

Newton v. *Newton* (1885) 11 P. D. 11, explained and followed.

Noakes v. *Noakes and Hill* (1877) 4 P. D. 60, discussed.

This was a motion on behalf of the petitioner, Mabel Mary Burmester, to dispense with personal service and to order that the petition for permanent maintenance filed on January 31, 1913, be served on Charles Mansel Burmester, the respondent, by leaving the same with Charles George Scott, of 35, New Broad Street, London, his solicitor.

1913

BURMESTER v. BURMESTER.

No question arose upon this part of the motion.

But the petitioner, by her notice of motion, also asked the Court to grant an injunction restraining the said Charles Mansel Burmester and/or his agents from in any way charging or dealing with the property the subject-matter of the said petition save and except as to the income therefrom up to the date of any order to be made on such petition for maintenance, and to make such further or other order as might be just.

Notice of the motion was served on the said Charles George Scott.

The affidavit of the petitioner filed in support of the motion stated, inter alia, that she was married in 1904, and that on June 24, 1912, a decree nisi for the dissolution of the marriage was pronounced on the grounds of the cruelty and adultery of the respondent; that on January 31, 1913, a petition for permanent maintenance was filed; that while the proceedings for divorce were pending the respondent paid to her, "in lieu of alimony pendente lite," the monthly sum of 15*l.*, which was ultimately increased to the weekly sum of 4*l.*; that on January 18, 1913, the said allowance was discontinued, and a letter of that date from the London branch of the Royal Bank of Canada was received by her to the effect that they were not sending her the usual payment of 4*l.*, as they had received instructions from their Vancouver branch that the payments were to be discontinued.

The petitioner's affidavit further stated that the respondent was at present residing at Vancouver, British Columbia, and that he was carrying on business as a financial and land agent; that he was engaged to be married and that he had threatened to settle all his property on his intended wife; that the petitioner had no means of her own, and that she and the child of the marriage, who was in the petitioner's custody under order of the Court, would be left destitute.

It appeared that the respondent, in addition to land in British Columbia, was entitled to a sum of 2000*l.* on the death of his father, on December 28, 1912, and that he was entitled to a further sum of 2000*l.*, subject to his mother's life interest.

1913

BURMESTER v. BURMESTER.

Bayford, for the petitioner.

R. J. Willis, for the respondent. No authority has been cited in support of the application for an injunction. *Newton* v. *Newton* (1) is against it. The petitioner has not yet applied to make the decree absolute, although she might have done so. There is no order of the Court fixing any amount. The Court will not grant an injunction in such circumstances. *Newton* v. *Newton* (1) was referred to and approved in another case of the same name. (2) [He also referred to *Sidney* v. *Sidney*. (3)]

[SIR SAMUEL EVANS, PRESIDENT. Apparently in *Newton* v. *Newton* (2) the order, confirming the registrar's recommendation in his report, was made before the motion for an injunction was made or acceded to.]

Bayford in reply. *Newton* v. *Newton* (1) is distinguishable because that was with regard to alimony pendente lite.

[SIR SAMUEL EVANS, PRESIDENT. Does that matter?]

Yes. Because there is, in that case, no power to order security for the allowance. It is not a question of whether there is an existing order, but whether there is a reasonable probability of part of the respondent's property being allocated for the particular purpose.

SIR SAMUEL EVANS, PRESIDENT. I am of opinion that I have no right or authority to grant the injunction asked for.

In the case of *Sidney* v. *Sidney* (3) the Divorce Court had made the decree absolute dissolving the marriage, and had also made an order for permanent maintenance. An application was thereupon made to Malins V.-C., in the Chancery Court, to protect the property for the former wife on the ground that the husband was dissipating his property. That case is not very well reported, but the decision appears to have been adopted and acted upon in 1895 by Gorell Barnes J. in *Newton* v. *Newton*. (2)

It is quite true that in the earlier case of *Newton* v. *Newton* (1), before Sir James Hannen, the matter was discussed with reference to alimony pendente lite; but, in dealing with it, Sir James Hannen, in a considered judgment, deals with the broad question

(1) 11 P. D. 11. (2) [1896] P. 36.
(3) (1867) 17 L. T. (N.S.) 9.

of law, and it seems to me that the proper conclusion to come to is that he did not intend to deal merely with the case of alimony pendente lite, but that he laid down principles equally applicable to cases of permanent alimony and maintenance. He explained (1) that in *Noakes* v. *Noakes and Hill* (2), which arose on a petition for variation of settlements, the case had not been argued before him; and the reason which he gave for his decision differing from that in *Noakes* v. *Noakes and Hill* (2) was that in the last-named case there was not any subsisting order for the payment of a fixed sum; and, in dealing with *Sidney* v. *Sidney* (3), he points out that there was there a subsisting order for the payment of a specific sum.

I think that Sir James Hannen, in the case of *Newton* v. *Newton* (4), must be taken to have decided that, where a fixed sum has not been made payable by any subsisting order, the Court cannot restrain persons, who may ultimately be affected, from dealing with their property. That case binds me.

I therefore refuse the application for an injunction.

Solicitors for petitioner: *Dunderdale, Dehn & Co.*

Solicitors for respondent: *C. G. Scott, Son & Pryce.*

(1) 11 P. D. at p. 13.
(2) 4 P. D. 60.
(3) 17 L. T. (N.S.) 9.
(4) 11 P. D. 11.

H. D. G.

P. D. 1912 *Dec.* 20. C. A. 1913 *Feb.* 1, 13.

[IN THE PROBATE DIVISION AND IN THE COURT OF APPEAL.]

BROOKING-PHILLIPS *v.* BROOKING-PHILLIPS.

Divorce—Practice—Pleadings—Wife's Petition for Restitution of Conjugal Rights—Answer alleging Wife's Adultery—Reply alleging Husband's Adultery—Par delictum—Compensatio Criminis—Irrelevance—Striking out.

In answer to a wife's petition for restitution of conjugal rights a husband alleged that the wife had committed adultery, but he asked for no relief. The wife replied denying her adultery and alleging that the husband himself had been guilty of that offence :—

Held by Bargrave Deane J. and by the Court of Appeal, that, having regard to the statutory changes effected by the Matrimonial Causes Acts, 1857 and 1884, the decision in *Seaver* v. *Seaver* (1846) 2 Sw. & Tr. 665 (Appendix II.), that where both husband and wife had committed adultery, and neither could therefore obtain a divorce a mensa et thoro from the other, yet the wife was entitled to a decree for restitution, no longer applied to English divorce law.

Held, therefore, that the wife's recrimination of adultery was irrelevant and must be struck out from her reply.

Decision of Bargrave Deane J. affirmed.

The view expressed in *Russell* v. *Russell* [1895] P. 315, followed.

Seaver v. *Seaver*, 2 Sw. & Tr. 665 (Appendix II.) overruled.

Appeal from a decision of Bargrave Deane J. sitting in chambers.

The parties were married in 1893, and in December, 1911, the wife presented a petition alleging that her husband had withdrawn from cohabitation with her and had since April 29, 1911, kept and continued to keep away from her without any just cause whatever "and has refused and still refuses to render her conjugal rights"; and she prayed "that her said husband do return to her and render her conjugal rights; and that she may have such further and other relief as may be just." The husband, in his answer, denied that he had without any just cause whatever withdrawn from cohabitation with the petitioner "and/or since the 29th April, 1911, kept and continued to keep away from her and/or refused to render her conjugal rights." He further alleged that owing to her conduct and the condition of his health it was unsafe for him to live with her; and, further,

that the petitioner had been guilty of adultery in 1905 with one man (named) and in 1910 with another man (named); and he prayed that the Court would be pleased to dismiss the petition.

The petitioner, in her reply, filed on November 28, 1912, joined and took issue upon the first and second paragraphs of the answer; denied that she had been guilty of adultery as alleged in the said answer and in particulars delivered thereunder; and she further alleged in paragraphs 3 to 7 of the reply that the respondent had committed adultery with a woman (named) "and with other women whose names are unknown to the petitioner," the dates or periods for such alleged acts of adultery being, so far as specified in the reply, between October, 1896, and June, 1909, both inclusive; and the reply concluded: "wherefore the petitioner prays as before."

The respondent took out a summons before the registrar for the petitioner to shew cause "why paragraphs 3 to 7 inclusive of the reply should not be struck out on the ground that the same are wholly irrelevant, and that the costs of this application be the respondent's in any event."

This summons was dismissed with costs, and the registrar certified for counsel thereon.

The respondent appealed.

1912. Dec. 20. *Le Bas*, for the respondent. The registrar considered himself bound by *Seaver* v. *Seaver* (1), which was before the Matrimonial Causes Act, 1884, and was decided by the Court of Delegates in Ireland. That case is not binding on this Court. *Hope* v. *Hope* (2) shews that the Court here took a different view from that taken by the Court of Delegates in Ireland as to the effect of adultery by both parties in a suit for restitution of conjugal rights, and Sir Cresswell Cresswell held in that case that where both parties to such a suit were in pari delicto a decree should be refused. *Hope* v. *Hope* (2) should be followed in preference to *Seaver* v. *Seaver*. (1) Whatever may be the view taken as to those cases, *Seaver* v. *Seaver* (1) can no longer be relied on in any view since the

(1) 2 Sw. & Tr. 665 (Appendix II.). (2) (1858) 1 Sw. & Tr. 94.

1912

BROOKING-PHILLIPS v. BROOKING-PHILLIPS.

Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), and since the decision in *Russell* v. *Russell.* (1) The Court clearly has power now to refuse a decree of restitution of conjugal rights, whenever the result of such a decree would be to compel the Court to treat one of the spouses as deserting the other without reasonable cause, contrary to the real truth of the case. This is shewn by the judgment of Lopes L.J. in *Russell* v. *Russell.* (2) The Matrimonial Causes Acts have introduced new considerations since *Seaver* v. *Seaver* (3) was decided, and the old idea that there could be no middle state between consortium vitæ and divorce no longer applies. This is also shewn from the judgment of Lopes L.J. (4) Assuming, therefore, that the petitioner succeeds in establishing the adultery of the respondent, it will avail her nothing, as the Court will now no longer hold that a husband must return to cohabitation with an adulterous wife, even though the husband himself may have been guilty of adultery; and, until the husband succeeds in proving the adultery of his wife, he has no answer to this petition. Moreover, as no relief is claimed by the answer, the reply cannot be regarded as an answer to a petition. Paragraphs 3 to 7 of the reply are therefore irrelevant and should be struck out, because, if the husband does not succeed in establishing that he has reasonable cause for living apart from his wife by proving that she is an adulteress, the allegation in the reply is immaterial; and, if he does prove her adultery, the proof by the wife that her husband also has committed adultery will be of no service to her, as she will, notwithstanding his adultery, not be entitled to a decree of restitution of conjugal rights. The paragraphs in question should be struck out now and should not be left to be dealt with at the hearing, because this would add enormously to the expense, and no good purpose would be served.

Pridham Wippell, for the petitioner. The doctrine of compensatio criminis applies: *Seaver* v. *Seaver* (3), which was taken on appeal before the Court of Delegates in Ireland. It

(1) [1895] P. 315.
(2) Ibid. at p. 334.
(3) 2 Sw. & Tr. 665 (Appendix II.).
(4) [1895] P. at pp. 329, 330, 331, 333.

is true that in *Hope* v. *Hope* (1) Sir Cresswell Cresswell, the Judge Ordinary of the English Court, decided otherwise; but *Seaver* v. *Seaver* (2) was not brought to his attention, not having then been reported. In the present case the respondent charges his wife with adultery but seeks no relief. If both parties were found, at the hearing, to have committed adultery, the husband should not be put into the position of being able to throw his wife penniless upon the world. Moreover, in the event of the husband being found guilty, the wife should, at the hearing, be allowed to amend her prayer and ask for a judicial separation.

BARGRAVE DEANE J., in giving his decision allowing the appeal, said that, in his view, paragraphs 3 to 7 of the reply must be struck out. A suit for restitution of conjugal rights must be brought bona fide, and any one bringing such a suit must, moreover, come to the Court with clean hands. A decree for restitution of conjugal rights would not be made in favour of a petitioner who was guilty of adultery. The only ground advanced on behalf of the petitioner was founded on the doctrine of compensatio criminis, but there was no such doctrine recognized in this Court. The nearest case recognized here was where, both parties in a divorce suit having been guilty of adultery, the Court exercised a discretion. A suggested alternative prayer, by the petitioner, for judicial separation was inconsistent with the petition as presented, and would go to shew that the petitioner's claim for restitution of conjugal rights had not been put forward in good faith. In his Lordship's opinion *Seaver* v. *Seaver* (2) was no longer good law. The simple question in this case was, Aye or No, had the petitioner been guilty of adultery? Two blacks could never make a white, and, in his view, *Seaver* v. *Seaver* (2) was inconsistent with the principles of the Matrimonial Causes Acts, 1857 and 1884. The appeal would be allowed, but the wife must have her costs. In case the petitioner should be advised to carry the case further, she might take leave to appeal without further argument.

H. D. G

(1) 1 Sw. & Tr. 94. (2) 2 Sw. & Tr. 665 (Appendix II.).

C. A.
1913

BROOKING-PHILLIPS v. BROOKING-PHILLIPS.

The petitioner appealed.

1913. Feb. 1. *Pridham Wippell* (*Noel Middleton* with him), for the appellant. The husband sets up the wife's adultery merely in bar. He cannot by abstaining from asking any relief on that ground bar her petition for restitution. Where both parties are guilty the wife is not deprived of her right to restitution: *Seaver* v. *Seaver*. (1)

[BUCKLEY L.J. That case is not reconcilable with *Hope* v. *Hope*. (2)]

Hope v. *Hope* (2) was decided by the Judge Ordinary of the Divorce Court without *Seaver* v. *Seaver* (1) being cited to him—it was not then reported.

[HAMILTON L.J. Having regard to the reasoning upon which the decision in *Seaver* v. *Seaver* (1) was based, that case does not seem now to apply in an English Court.]

The present case stands on a different footing from the old cases. It is inequitable that the wife should not have an opportunity of raising the question of the husband's adultery. By not seeking any relief he escapes from all liability to support his wife.

[HAMILTON L.J. The point is mentioned in the Laws of England, vol. xvi., p. 494, par. 1012.]

Apart from *Seaver* v. *Seaver* (1) the Ecclesiastical Courts of this country have dealt with the point: *Kirby* v. *Kirby*. (3) *Seaver* v. *Seaver* (1) has, moreover, been recognized as an authority by Cave J. in *Wilson* v. *Glossop*. (4)

[HAMILTON L.J. It was decided in *Russell* v. *Russell* (5) that the Matrimonial Causes Act, 1884, has materially altered the old law as to restitution of conjugal rights, and has given the Court a discretion to refuse the decree. That being so, the wife's recrimination of the husband's adultery is irrelevant.]

The Court having a discretion ought to have all the facts before it. The question in *Russell* v. *Russell* (5) before the Court of Appeal was whether anything could be set up by the husband

(1) 2 Sw. & Tr. 665 (Appendix II.).
(2) 1 Sw. & Tr. 94.
(3) (1801) 2 Curt. Eccl. Rep. 214, n.
(4) (1887) 19 Q. B. D. 379, 381.
(5) [1895] P. 315.

in answer to a petition for restitution short of what would enable him to obtain a divorce. It really followed *Moore* v. *Moore*. (1) In this case the pleading should be allowed to stand. It would be inequitable to strike out paragraphs 3 to 7 and so deprive the wife of her answer to the husband's allegation of adultery.

[HAMILTON L.J. If it be no answer at all, that is ground for striking it out.]

It would not be right to deprive the Court of the opportunity of investigating the whole facts of the case. The husband should not be allowed to take advantage of the wife's offence where he has been equally guilty.

Le Bas, for the respondent. The order of the learned judge is right. The registrar thought he was bound by *Seaver* v. *Seaver* (2), but that case is not binding on this Court, and is inconsistent with *Hope* v. *Hope* (3), which was decided after the passing of the Matrimonial Causes Acts, 1857 and 1884. As pointed out in the judgment of Lopes L.J. in *Russell* v. *Russell* (4), the law as to restitution has been materially altered by those Acts. Since the Act of 1884 a middle course has been recognized. The Court has now power to refuse a decree for restitution wherever the result of such decree would be to compel the Court to treat one of the spouses as deserting the other without reasonable cause, contrary to the real truth of the case. Assuming therefore that the petitioner were to establish the adultery of her husband it would avail her nothing, because the Court would not compel him to cohabit with an adulterous wife, and until he established her adultery he would have no answer to her petition. That being so, paragraphs 3 to 7 of her reply are irrelevant, and the judge was right in ordering them to be struck out.

In *Wilson* v. *Glossop* (5) Cave J. pointed out that Cresswell J.O. in *Hope* v. *Hope* (3) drew a distinction between mutual guilt, which he held not to be compensation, and connivance, which he admitted would entitle an adulterous wife to sue for restitution of conjugal rights.

(1) (1840) 3 Moo. P. C. 84.
(2) 2 Sw. & Tr. 665 (Appendix II.).
(3) 1 Sw. & Tr. 94.
(4) [1895] P. at p. 334.
(5) 19 Q. B. D. 379, 383.

C. A. 1913

BROOKING-PHILLIPS v. BROOKING-PHILLIPS.

It is said that if the wife cannot raise the question now she can never do so. That is not true, because she can get a divorce on the ground of her husband's adultery and desertion. As to *Kirby* v. *Kirby* (1), there the husband prayed for separation, and the allegation was therefore relevant.

Pridham Wippell in reply.

Cur. adv. vult.

Feb. 13. BUCKLEY L.J. In this case the wife presented her petition for restitution of conjugal rights. The husband pleaded the wife's adultery in bar, but claimed no relief based upon the allegation. The wife replied by alleging the husband's adultery. The allegations are contained in paragraphs 3 to 7 of the reply. The order under appeal is one striking out those paragraphs. The question is whether that order is right.

The allegation of the husband's adultery ought to be allowed to remain in the reply if it be relevant, and ought to be struck out if it be irrelevant. The question is whether it is relevant or not. It will be relevant only if it be either, first, an allegation in support of the wife's case, or, secondly, an allegation by way of rebuttal of the husband's case. An allegation of the husband's adultery is no ground in support of the wife's petition for restitution of conjugal rights. She has no greater right of restitution by reason of the fact that the husband has committed adultery. The allegation is therefore not one in support of her case. Neither is it relevant by way of rebuttal of the husband's case unless the doctrine of the canon law is admissible as expressed in the words "paria crimina mutua compensatione delentur" or "mutua compensatione ambo adulteria abolentur."

I have nothing here to do with connivance or condonation. The question is whether the guilt of the wife is to be considered as abolished by the guilt of the husband so as to restore the wife to the condition of an innocent person with reference to her conjugal rights.

Can a wife guilty of adultery say that she is recta in curia because her husband also is guilty?

In 1801 in *Kirby* v. *Kirby* (1), the wife having brought her

(1) 2 Curt. Eccl. Rep. 214, n.

suit for restitution of conjugal rights, the husband pleaded adultery by the wife in bar and also prayed separation. The wife replied denying the adultery and recriminating adultery against him. The allegation was allowed to stand. But the case does not assist in the solution of the present case. The husband had there prayed relief and to that relief the allegation was relevant. In *Seaver* v. *Seaver* (1) in the year 1846 the point to be decided in the present case arose in Ireland. The matter was carried to the Court of Delegates and they held that the doctrine of the canon law was incorporated into our law. The grounds of the decision I think were that, inasmuch as the law as it stood at that time knew no middle term between legal separation by divorce and the continuance of the matrimonial duties with all their consequences, it followed that if both parties had been guilty of adultery so that neither could obtain a divorce against the other, there remained the duty of consortium vitæ, and it was this obligation which the wife was by her petition seeking to enforce. If this was so the recrimination by the wife of the husband's adultery was relevant. The Irish Court gave the wife a decree for restitution of conjugal rights where both parties had been guilty of adultery, and did it upon the footing that no mutual crime or mutual compact could release or suspend the obligation of the marriage vow: that inasmuch as neither could obtain a divorce against the other there existed an obligation enforceable in law to give conjugal rights. In *Hope* v. *Hope* (2) in the year 1858 the same point was decided the other way in England by Cresswell J.O. *Seaver* v. *Seaver* (1) had not at that date been reported, and is not referred to in *Hope* v. *Hope*. (2) The decision in *Hope* v. *Hope* (2) was that the husband's adultery was no ground for enabling a guilty wife to sustain a suit for the restitution of conjugal rights. In other words *Hope* v. *Hope* (2) decided that in a case such as the present the allegation of the husband's adultery was irrelevant. The Judge Ordinary, after referring to the decision of Lord Stowell in *Proctor* v. *Proctor* (3) (where Lord Stowell pointed out that the canon law acknowledges no intermediate state between a cohabitation and

(1) 2 Sw. & Tr. 665 (Appendix II.). (2) 1 Sw. & Tr. 94.
(3) (1819) 2 Hagg. Cons. 292.

C. A. 1913

BROOKING-PHILLIPS v. BROOKING-PHILLIPS.

Buckley L.J.

a formal separation and therefore presumes when it withholds its divorce of separation that the parties will return to cohabitation), went on to say that if the canon law bound the Courts of this country the passages which he had cited would shew that the wife in such a case as the present was entitled to a decree, but he holds expressly that under such circumstances as existed in *Hope* v. *Hope* (1), and as exist in the present case, a decree for restitution of conjugal rights could not at any time have been obtained, and he states the result of his investigation of the question as follows: "I find in a decretal of Gregory IX., an assertion that an adulterous wife was entitled to be received by her husband, if he also had been guilty of a similar offence, and this is mentioned as the law by several canonists: Lancellottus; Sanchez, De Matrimonio; and Ayliffe (in his Parergon). I do not find any instance in which the law so laid down has been adopted and acted upon as part of the ecclesiastical law of this land." *Hope* v. *Hope* (1) is an express decision against the contention of the appellant in the present case, without the addition of the ground presently stated. In *Wilson* v. *Glossop* (2) the subject is dealt with in a judgment of Cave J., but that case turned upon connivance of the husband. In *Russell* v. *Russell* (3) Lopes L.J. discusses *Seaver* v. *Seaver* (4) at some length, but *Hope* v. *Hope* (1) seems not to have been drawn to the attention of the Court. I cannot find that it was cited or mentioned at all. As regards *Seaver* v. *Seaver* (4) the Lord Justice (5) points out that the Matrimonial Causes Acts, 1857 and 1884, have introduced the middle state whose non-existence at the date of *Seaver* v. *Seaver* (4) was the ground of decision in that case. Sect. 16 of the Act of 1857 had for the first time made desertion a ground for judicial separation, and s. 5 of the Act of 1884 had introduced as a consequence of a decree for restitution of conjugal rights a right in the petitioner to institute a suit for judicial separation. Whatever might have been the disposition of the Court in England towards the decision in *Seaver* v. *Seaver* (4) before

(1) 1 Sw. & Tr. 94.
(2) 19 Q. B. D. 379.
(3) [1895] P. 315, at p. 330.
(4) 2 Sw. & Tr. 665 (Appendix II.).
(5) [1895] P. at p. 331.

those Acts, the ground of the decision itself seems to me to be, by the decision in *Russell* v. *Russell* (1), recognized as being now removed, and whether in choosing between *Seaver* v. *Seaver* (2) and *Hope* v. *Hope* (3) the former would have been regarded as good law in England before those Acts, it cannot in my opinion be so regarded now.

If I am right in the above respects it follows that the wife's allegations in paragraphs 3 to 7 of her reply are not relevant, and the order striking them out is right. In my judgment the decision under appeal is right and this appeal should be dismissed with costs.

HAMILTON L.J. I am of the same opinion. The petitioner alleges that if her reply stands, she can at the hearing prove adultery against the respondent and can thereby in law answer his allegation of adultery against herself and remove the bar which her adultery would constitute to her claim for restitution of conjugal rights. The competence of her reply admittedly rests on the applicability of the Irish case of *Seaver* v. *Seaver* (2) as a decision which should be followed in an English Court. We cannot strike out this part of her reply and so prevent her from raising this case unless it is clear that in law her allegations of adultery against her husband are in these proceedings immaterial. The whole question accordingly is, Does the rule laid down in *Seaver* v. *Seaver* (2) apply to English divorce law since the statutory changes of 1857 and 1884?

It is unnecessary on this occasion to discuss the soundness of the rule laid down in that case or the relative authority of *Hope* v. *Hope* (3), which, following *Govier* v. *Hancock* (4) and *Rex* v. *Flintan* (5), laid down a contrary rule. *Seaver* v. *Seaver* (2), after being referred to without question in the Divisional Court in 1887 in *Wilson* v. *Glossop* (6), was in this Court in 1895, in *Russell* v. *Russell* (1), expressly treated as rightly decided. But the decision of that case by the unanimous judgment of this Court upon the wife's claim for restitution of conjugal rights proceeded upon the

(1) [1895] P. 315.
(2) 2 Sw. & Tr. 665 (Appendix II.).
(3) 1 Sw. & Tr. 94.
(4) (1796) 6 T. R. 603.
(5) (1830) 1 B. & Ad. 227.
(6) 19 Q. B. D. 379.

C. A. 1913

BROOKING-PHILLIPS v. BROOKING-PHILLIPS.

Hamilton L.J.

ground that since the Act 47 & 48 Vict. c. 68, supervening upon the changes produced by the Matrimonial Causes Act of 1857, the reasoning adopted in *Seaver* v. *Seaver* (1), and therefore the rule laid down in it, have no longer any application in England. I think that we must follow the view expressed in *Russell* v. *Russell*. (2)

It is true that in his opinion in the House of Lords on the husband's appeal from the Court of Appeal Lord Halsbury expressed his dissent from the view taken in this Court of the Act of 1884, but as the wife had abandoned her appeal the matter was not before the House, and the decision of this Court remains binding upon us.

Seaver v. *Seaver* (1) decided that the wife is permitted in proceedings for restitution to recriminate her husband's adultery, because, as the law sanctions no alternative to cohabitation short of divorce a mensa et thoro, it must in a case where the husband has committed a matrimonial offence, and therefore cannot be so divorced, find some means whereby it can properly decree to the wife restitution of her conjugal rights. It does so by applying to restitution the canonists' doctrine of compensatio criminis, and by allowing the wife to reply adultery against her husband, and so cancel his proof of adultery against her, and place herself in as good a position to claim restitution as if she had remained chaste. Having no discretion to refuse restitution where it cannot decree separation a mensa et thoro a Court christian exercising jurisdiction in a matrimonial cause must allow the wife thus to answer the husband's charge.

Russell v. *Russell* (2) decided that legislative changes have since 1857 removed the exclusive opposition of restitution and of judicial separation, and since 1884 have given the Court a discretion which enables it to refuse restitution to the one spouse, even though it also refuses judicial separation to the other. It accordingly decides that the reasoning of *Seaver* v. *Seaver* (1) is no longer sound in England, and, by consequence, where the husband charges adultery, not as a ground for divorce which he does not claim, but as an answer to his wife's claim for restitution, that issue is independent of his own misconduct.

(1) 2 Sw. & Tr. 665 (Appendix II.). (2) [1895] P. 315.

Even in a case where, as here, he does not ask, or as in *Russell* v. *Russell* (1) cannot get, substantive relief, he can bar her claim by proof of her misconduct, and recrimination of his adultery on her part is irrelevant, because it leads to nothing. The Court will not now treat a wife as innocent who is proved to be guilty, because it is no longer constrained to do so by the inexorable alternative of restitution of conjugal rights to a wife whom her husband cannot divorce. Hence this reply alleges matter that is not material to any issue in this proceeding.

It may be added that the introduction of such a reply might in itself be much abused. In my opinion the decision of Bargrave Deane J. was right and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for petitioner: *De la Chapelle & Co.*

Solicitors for respondent: *Milner & Bickford.*

(1) [1895] P. 315.

G. A. S.

C. A.
1912
Nov. 28.
1913
March 4.

[IN THE COURT OF APPEAL.]

THE OLYMPIC (Wages).

[1911. Fo. 553.]

Admiralty—Ship—Seamen—Wages—"Wreck"—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 158, 162.

The plaintiffs, two members of the crew of a steamship, subscribed their names to articles of agreement by which they undertook to serve on board the ship, in the capacities and at the wages therein mentioned, on a voyage from Southampton to New York, and/or, if required, to any port within the North Atlantic and South Atlantic Oceans, trading as may be required, until the ship returns to a final port of discharge in the United Kingdom for any period not exceeding twelve months, and should the vessel put back into port through accident, the crew to be transferred to any other vessel belonging to the same owners taking the place of the vessel named.

On the same day that the vessel left Southampton for New York she came into collision with another vessel, and was so seriously damaged in the hull that she was obliged to come to anchor, and the next day to return, under her own steam, to Southampton, where the crew, including the plaintiffs, were discharged with three days' pay, and her passenger and freeboard certificates having been, on demand, returned to the Board of Trade, the vessel was sufficiently patched up to enable her to proceed to Belfast, where she could be repaired, and, at the end of nine weeks, she received back the above-mentioned certificates enabling her to proceed to sea on the voyage from Southampton to New York.

The plaintiffs, under s. 162 of the Merchant Shipping Act, 1894, claimed, in addition to the three days' wages earned by them, a further sum of one month's wages by way of compensation for the damage caused to them by being discharged otherwise than in accordance with the terms of the agreement, without fault on their part, and without their consent:—

Held by the Court of Appeal (Vaughan Williams L.J. and Buckley L.J., Kennedy L.J. dissenting), affirming the decision of Bargrave Deane J., dismissing the claim of the plaintiffs with costs, that, in the circumstances, by reason of the injury sustained by the vessel in the collision, she had ceased to be in a seaworthy condition to continue the adventure, so that, in respect of the voyage agreed upon, the case fell within the words of s. 158 of the above mentioned Act, namely, that "by reason of the wreck . . . . of the ship" the service of the plaintiffs had terminated before the date contemplated by the agreement, and, therefore, the plaintiffs had been properly discharged with three days' pay.

Per Kennedy L.J.: The damage caused to the vessel by the collision delayed the voyage, but did not dissolve the contract with the

crew, and, therefore, if the defendants, the owners of the ship, chose, for their own pecuniary advantage, to relieve themselves of the burden of that contract, they were liable, under s. 162 of the Act, to pay the compensation, not exceeding one month's wages, claimed by the plaintiffs.

C. A. 1913

THE OLYMPIC.

APPEAL by plaintiffs, Thomas Douglas Fraser, fireman, and William Weller, able seaman, two of the members of the crew of the White Star liner *Olympic*, against a decision of Bargrave Deane J. dismissing their claim upon the respondents (defendants), the Oceanic Steam Navigation Company, Limited, owners of the *Olympic*, for one month's wages at 6*l.* and 5*l.* respectively, by way of compensation for alleged wrongful discharge.

The case is reported on the question of the meaning to be attached to the word " wreck " in s. 158 of the Merchant Shipping Act, 1894, which runs as follows:—

" Where the service of a seaman terminates before the date contemplated in the agreement by reason of the wreck or loss of the ship, or of his being left on shore at any place abroad under a certificate granted as provided by this Act of his unfitness or inability to proceed on the voyage, he shall be entitled to wages up to the time of such termination; but not for any longer period."

The following statement of the material facts is taken from the judgment of Kennedy L.J.:—

" On September 20, 1911, the defendants' steamship *Olympic* sailed in the forenoon from Southampton on a voyage to New York. The plaintiffs were respectively a fireman and a seaman on board that vessel. The plaintiffs had signed articles on September 16. The agreement was for 'a voyage from Southampton to New York (via Cherbourg and Queenstown) and/or if required to any port or ports within the North Atlantic and South Atlantic Oceans trading as may be required until the ship returns to a final port of discharge in the United Kingdom for any period not exceeding twelve months.'

" The agreement also provided that 'if from any cause the said ship cannot sail on the date appointed or should the vessel put back into port through accident, the said crew will be transferred to any other vessel belonging to the same owners taking

C. A. 1913

THE OLYMPIC.

the place of the vessel herein named, at the same rate of wages and in the several capacities herein named.'

"The wages to which the plaintiffs were entitled under the agreement were 6*l.* per month and 5*l.* per month respectively.

"Within a short time after leaving Southampton, the *Olympic* came into collision off Cowes in the Isle of Wight with H.M.S. *Hawke*, and sustained damage to her hull, at a point on the starboard side about 90 feet from her stern. Anchor was dropped in Cowes Roads, and she remained at anchor until September 21, when she steamed back into Southampton.

"The damage was local; but it was so far serious that she could not proceed to sea again on an Atlantic voyage without some permanent repairs. After receiving temporary repairs at Southampton she proceeded under her own steam to Belfast and remained there for some time, whilst those repairs were being executed; and it was not until November 29, that is, upwards of nine weeks after her mishap, that the *Olympic* resumed her place in the defendants' Atlantic service. Her passenger and freeboard certificates were, on September 22, upon an official application, returned to the Board of Trade surveyor at Southampton, to whom, in accordance with the terms of the passenger certificate, the defendants were bound to report in writing within twenty-four hours after the occurrence 'any material damage affecting the seaworthiness of the *Olympic* either in the hull or in any part of the machinery,' and who, of course, upon receiving such report of this mishap, was bound to require the return of these documents, in order to ensure, before she made an Atlantic voyage, that sufficient repairs had been executed, and that the nature of the repairs was such as not to alter the position of the centre of the load line disc. These certificates were returned to the defendants a day or two before the *Olympic* sailed for New York on November 29.

"On September 22, the plaintiffs, without their consent, were discharged by the defendants, together with the rest of the crew of the *Olympic*. The defendants have either paid, or have always been willing to pay, their wages up to that date, but have refused to pay them any compensation for the loss of wages which the

plaintiffs would have earned if the contract period of service had been completed.

"The plaintiffs claim to be paid compensation in the nature of wages under s. 162 of the Merchant Shipping Act, 1894. That section runs as follows:—

"'If a seaman, having signed an agreement, is discharged otherwise than in accordance with the terms thereof before the commencement of the voyage or before one month's wages are earned without fault on his part justifying that discharge and without his consent, he shall be entitled to receive from the master or owner, in addition to any wages he may have earned, due compensation for the damage caused to him by the discharge not exceeding one month's wages, and may recover that compensation as if it were wages duly earned.'

"The plaintiffs' claims were brought in the first instance before the justices at Southampton, sitting as a Court of summary jurisdiction under the Merchant Shipping Act, 1894, s. 164. The circumstances in regard to the plaintiffs' engagement, service, and discharge, and also their pecuniary loss, inasmuch as they were in fact unable to get other employment, were duly proved. The justices, after hearing this evidence, referred the claims to the Admiralty Division of the High Court under the provisions of the Merchant Shipping Act, 1894, s. 165 (iii.). There never has been any dispute as to the facts. There has never been any suggestion that the plaintiffs committed any fault justifying their discharge without their consent; nor has any substantial controversy been raised by the defendants as to the amount of the compensation, not exceeding one month's wages, which the plaintiffs are entitled to recover, if s. 162 applies to this case, although it appears from the evidence that in ordinary course the voyage of the *Olympic* to New York and back would have occupied a period variously stated to be seventeen or eighteen or twenty-one days. The defendants' contention is that s. 162, quoted above, and which would seem, prima facie, to be applicable to the facts of the present case, is not the section to be applied; but that the rights of the parties are governed by s. 158 (set out above), an enactment in substance and, without any material alteration

C. A. 1913

THE OLYMPIC.

of language, a re-enactment of s. 185 of the Merchant Shipping Act, 1854."

On September 29, 1911, the plaintiffs' summons came before the petty sessional court at Southampton, and as the justices were equally divided on the question whether the *Olympic* was a wreck or not, no order was made, and, by consent, the claims were referred to the Admiralty Division of the High Court, and were heard on March 5 and 6, 1912. It was then contended, on behalf of the plaintiffs, that as they had been discharged otherwise than in accordance with the terms of the agreement signed by them before one month's wages had been earned, without fault on their part justifying that discharge and without their consent, they were entitled, under s. 162 of the Merchant Shipping Act, 1894, to recover from the owners of the *Olympic*, in addition to the three days' pay tendered to them, one month's wages by way of compensation for the damage caused to them by the discharge, that is, 6*l.* in the case of the plaintiff fireman, and 5*l.* in the case of the plaintiff seaman.

On behalf of the defendants, the owners of the *Olympic*, it was suggested that, even assuming s. 162 of the Merchant Shipping Act, 1894, applied, the amount of compensation, to which the plaintiffs would be entitled under that section, was in the discretion of the Court, the effect of the section being to limit the compensation to "not exceeding one month's wages." In the present case the evidence given before the justices shewed that the voyage to New York and back, contemplated by the agreement, would take only about eighteen days, and as the plaintiffs were landed in the same port from which they started, no question of maintenance or cost of returning home arose. Secondly it was pressed upon the attention of the Court that, in the circumstances of the present case, the amount tendered to the plaintiffs by the defendants, namely, three days' wages, was sufficient, for the application of s. 162 was overridden by the express terms of s. 158, by which section, if the service of the plaintiffs terminates before the date contemplated in the agreement by reason of the wreck of the ship, they are only

entitled to wages " up to the time of such termination, but not for any longer period," that is to say, taken in conjunction with the context, the words " wreck of the ship" mean that the ship being, by reason of damage sustained, unfit to proceed on the voyage, the service of the seamen is thereby terminated, and, in the present case, without fault on either side, the voyage, by reason of the effects of the collision, came to an end, the ship being rendered incapable of crossing the Atlantic without such substantial repairs as would occupy an indefinite period, and, further, the withdrawal of the passenger and freeboard certificates by the Board of Trade rendered the vessel unable to proceed on the voyage, and it was not until the repairs, which in fact necessitated a delay of nine weeks, had been completed, that the certificates in question were returned to the owners of the *Olympic*.

By way of reply, exception was taken, on behalf of the plaintiffs, to the application of s. 158 to the circumstances of this case on the ground that the word " wreck " involved a different set of considerations including the necessity of touching the ground whether in respect of goods or portions of the ship washed ashore.

In addition to the cases mentioned in the judgment, the following were referred to: *Constable's Case* (1); *The Woodhorn* (2); *Austin Friars Steamship Co.* v. *Strack* (3); *Sievewright* v. *Allen* (4); *Tindle* v. *Davison* (5); *Taylor* v. *Caldwell* (6); *Nicholl* v. *Ashton, Eldridge & Co.* (7); *The Scarsdale* (8); Stroud's Judicial Dictionary; the Century Dictionary; the Merchant Shipping Act, 1894, ss. 134, 271, 272, 278, 279, 280, s. 331, sub-s. i., ss. 332 and 510; Kay's Law of Shipmasters and Seamen, 2nd ed., p. 351.

On April 1, 1912, the following judgment was delivered by :—

BARGRAVE DEANE J. In this case two members of the crew of the *Olympic*, one of the White Star Line, belonging to the Oceanic Steamship Company, brought a plaint before the magistrates at

(1) (1601) 5 Co. Rep. 106 a.
(2) (1891) 92 L. T. Jo. 113.
(3) [1905] 2 K. B. 315.
(4) [1906] 2 K. B. 81, at p. 85.
(5) (1892) 7 Asp. M. L. C. 169.
(6) (1863) 3 B. & S. 826.
(7) [1901] 2 K. B. 126.
(8) [1907] A. C. 373.

1912

THE OLYMPIC.

Bargrave Deane J.

Southampton, claiming wages for their services, one as fireman, and the other as seaman, on board the *Olympic*, on an agreement contained in the ship's articles as follows: They agreed to serve on a voyage from Southampton to New York, via Cherbourg and Queenstown, and/or, if required, to any port or ports within the North Atlantic or the South Atlantic Oceans, trading as may be required, until the ship returned to a final port of discharge in the United Kingdom, for any period not exceeding twelve months. They joined the ship on September 20 last year, and the vessel proceeded from Southampton on her voyage to New York, but, as is well known, she came into collision off Cowes in the Isle of Wight on that same day with H.M.S. *Hawke*, and received such serious damage that she had to go back to Southampton, where she discharged her cargo and her passengers, and, after being patched up sufficiently to enable her to proceed to Belfast, she went to Belfast, where alone she could be properly docked, and was there repaired, and was not able to continue her engagements until November 29, when she started for New York and did her voyage.

Now the crew claim their wages—these two men, I need not trouble about anybody else—under the provisions of the Merchant Shipping Act, 1894, s. 162, which is as follows: [The learned judge read the section already set out, and continued:] These two men's wages were 6*l.* and 5*l.* a month, and they have claimed that amount as having been discharged without fault, and, therefore, improperly. The answer to the claim is s. 158 of the Merchant Shipping Act, which is as follows: [The learned judge read the section already set out, and continued:] Those are the two sections which are relied upon—on behalf of the plaintiffs s. 162, and on behalf of the defendants s. 158—and the whole question turns upon the meaning of the words in s. 158 "wreck or loss" of a vessel. There is no definition in the Merchant Shipping Act or in any of the Acts of what "wreck" is, and it is agreed practically between the parties that I have got to base my decision on the meaning of the word "wreck"—whether the *Olympic* was a "wreck" within the meaning of the section or whether she was not. If she was a "wreck," then s. 158 applies; if she was not, then it does not apply.

A good many cases have been cited to me on one side and the other. Counsel for the claimants was unable to adduce any case where it had been held that a ship was, or was not, a "wreck" within the meaning of the Merchant Shipping Act, but he has based his argument on various cases in which goods have been decided to be "wreck" or "not wreck," and those cases are *Legge* v. *Boyd* (1), *The King* v. *Forty-nine Casks of Brandy* (2), and *The King* v. *Two Casks of Tallow*. (3) There, undoubtedly, the question was raised as to whether certain goods, which were found ashore, were, or were not, "wreccum maris." It is a very odd word "wreccum." Where it comes from I am not quite sure. It comes from the old Saxon which is "wraccum," I believe, but these cases, in my opinion, do not apply. They are cases in which the question arose whether goods, which undoubtedly were landed ashore in two of the cases out of a vessel which had been damaged, belonged to the owner of the foreshore or some other person. It was a question of a claim for property arising out of what was or what was not "wreccum maris." The other was a case in which the Customs claimed duty on tobacco brought ashore out of a ship for its protection, for fear it should be lost, and the question arose whether it was "wreccum maris" or not; but that does not affect the question of what the meaning of the word "wreck" is in s. 158, because I take it that goods may be "wreccum maris" on one principle whereas a ship cannot be treated quite in the same way.

In my opinion this vessel was, within the meaning of the words of s. 158, a "wreck." The words of the section are "wreck or loss"; "wreck" must be something short of "loss." A vessel may founder at sea; well, she would be a "loss," she would not be a "wreck." A "wreck" is something in which the vessel falls short of being a "loss," and in the case of *The Elizabeth* (4) the word used by Sir William Scott is I think "semi-naufragium." Well, we use the words "partial wreck" nowadays, and we use the words "constructive wreck," "constructive total wreck." We recognize qualifications of losses and wrecks, and the whole question I think depends upon this: was this

(1) (1845) 14 L. J. (C.P.) 138.
(2) (1836) 3 Hagg. Adm. 257.
(3) (1837) 3 Hagg. Adm. 294.
(4) (1819) 2 Dods. 403.

1912

THE OLYMPIC.

Bargrave Deane J.

vessel so much injured and damaged that she ceased to be, so far as the owners were concerned, a ship of any service to the owners?

There is a case, which I mentioned myself in the course of the arguments, of *The Suevic*. (1) If the argument of counsel for the claimants applies, that "wreck" means a vessel cast on the shore, then the *Suevic* was cast on the shore, but half of her is afloat to this day. She was cut in two, the fore-part which was cast on the rocks was left there, and I suppose has since broken up. The after-part was towed away and a new fore-part fitted to it, and she is still at this moment a navigable vessel. She was wrecked in one sense, but she was not in another. One has to look at every case which comes before the Court as to what are the true facts to see in what way those facts can be applied to the words of the section. I think the nearest approach—I have tried to find any other case—to this case is the case of *The Elizabeth* (2) to which I have referred. There, a vessel was in danger of damage, and I think was burnt, and she was eventually repaired, and the master in the exercise of his discretion—it was before the Merchant Shipping Act—discharged the crew. It was in a foreign port. He provided that the crew should be sent home, and everything was done so far as it was possible to mitigate the damage which they sustained by being discharged. They were discharged, and an action was brought by one of them for wages, similarly to the case which is now before the Court, and this is what Sir William Scott said in deciding that the master was justified in discharging them. It is at p. 406 where I am reading, and begins in this way: "Now, I confess it appears to me, that the circumstances in which this vessel was placed did vest in him an authority to discharge his crew upon proper conditions. Here was a ship that had encountered what the law might call a semi-naufragium —full of water, as they themselves state, so that they could not live on board. She is put into the hands of foreign carpenters for the course (a protracted course) of necessary repairs. It was doubtful whether she could at all receive such repairs as would restore her to a navigable state. It was by no means doubtful that she

(1) [1908] P. 154, 292. (2) 2 Dods. 403.

could not receive such repairs as would enable her to proceed till after the approach of spring in that climate had restored the seas to a navigable state, so as to allow her a passage. Is it clear law that the master, acting for his owners, could not, in such circumstances, dismiss the mariners on any terms whatever? If so, then he was bound to keep this crew in an unemployed state, living on shore, and keeping holiday all winter, at the expense of his owners, who were to continue all that time to pay, pro opere et labore, by virtue of the contract, though no work or labour could be performed, and thus the price of industry was to be regularly paid to unoccupied idleness! I know and feel the partiality which the maritime law entertains for this class of men, but it must not over-rule all consideration of justice to other classes, particularly to merchants, their employers, for what is oppressive to the merchant cannot but be injurious to the mariner. The seaman cannot be ultimately benefited by that which, as far as it operates, must operate to the discouragement of navigation."

Now that, to my mind, properly states what are the principles upon which this Court has to act. The *Olympic* was so seriously damaged that she ceased to be a navigable ship. She was taken under her own steam up Southampton Water to Southampton. On the 22nd, two days afterwards, these men were discharged and they were offered wages up to the date of that discharge. They claimed wages for a month, within the words of their agreed articles. Was the master justified in discharging them? In my opinion he was. The men themselves, who gave evidence before the justices, both agreed that it was impossible for them to continue to go on serving in the ship, that they would not, in her then condition, have continued to serve. What stronger evidence could there be of the state of that ship, and that she was to all intents and purposes in their opinion a "wreck"? Beyond that, I find that on September 22, the day they were discharged, a letter was handed to the manager of the White Star Line at Southampton by the officers of the Board of Trade: "Dear Sir,—In confirmation of the request made to you by Captain Clarke, I have to request that you will be good enough to return the passenger certificate and the freeboard certificate of the *Olympic*

1912

THE OLYMPIC.

Bargrave Deane J.

to these offices pending the completion of the repairs." Thereby the Board of Trade, acting in their official capacity, forbade this vessel to proceed on her voyage even if she could have done so, because she was not in a seaworthy condition to do it. The same day those certificates were returned, and on the back of this letter is this minute: "Received from the White Star Line passenger certificate and freeboard certificate of the *Olympic*, signed, Clarke, surveyor." Now the vessel could not proceed. She was under an embargo by the Board of Trade. She could not proceed as a passenger ship, and could not proceed to sea without getting a clearance from the port of Southampton. She eventually, having been patched up sufficiently, got a certificate to enable her to go to Belfast, but no further, and, therefore, this voyage, so far as the voyage was concerned which the men had agreed upon, was brought to a summary and proper conclusion.

In my opinion that ends the case, and I must find that these men were not entitled to recover more than the amount that was offered to them, namely, the money due up till the moment they were discharged on September 22.

1912. Nov. 28. *S. H. Emanuel*, for the appellants (plaintiffs), T. D. Fraser and W. Weller, two of the members of the crew of the *Olympic*.

Laing, K.C., and *W. N. Raeburn*, for the respondents (defendants), the owners of the steamship *Olympic*.

The arguments of counsel were the same as in the Court below (1), and sufficiently appear from the following judgments.

Cur. adv. vult.

1913. March 4. VAUGHAN WILLIAMS L.J. I agree with Bargrave Deane J. that the only question raised on the hearing before him in this case was whether the *Olympic* was a "wreck" within s. 158 of the Merchant Shipping Act, 1894, or whether she was not.

If she was a "wreck," then s. 158 applies; if she was not, then it does not apply.

It further seems to me that, if s. 158 applies, the plaintiffs

(1) Ante, pp. 96, 97.

respectively were not discharged within the meaning of s. 162 of the Merchant Shipping Act, 1894, but the service of these seamen terminated before the date contemplated in the agreement.

[The learned Lord Justice read ss. 158 and 162 of the Merchant Shipping Act, 1894, and continued:]

I agree further that in construing the word "wreck" in s. 158 of the Merchant Shipping Act, 1894, one should construe the word in relation to the subject-matter of the section, and should not limit the meaning of the word "wreck" to the meaning laid down in the cases decided with reference to whether goods belonged as "wreck" to the owner of the foreshore.

Sect. 158 of the Merchant Shipping Act, 1894, deals with a very different subject-matter from that dealt with in those cases; it deals with the termination of the service of a seaman before the date contemplated by the agreement by reason of certain specified causes, each of which fall within the category of involuntary causes for which neither the master nor owner on the one side, nor the seaman on the other, are actively responsible. I think it follows that any damage to the ship from a cause falling within the category I have mentioned, which does not constitute a loss of the ship but of necessity terminates the service of the seaman, will come within the term "wreck" in s. 158.

I think the word "wreck" means something less than total loss. I think that, in determining whether the wreck in question has terminated the service of the seaman, the tribunal which has to determine this question must first satisfy itself that the damage, which is alleged to have terminated the service, is physical damage caused at sea by perils of the sea to the ship; and, secondly, that such damage, although repairable, would make the ship unseaworthy for so long a time as to make the continuance of the voyage useless as a commercial venture.

On these points I agree with the views expressed by Bargrave Deane J., and I think, therefore, that this appeal must be dismissed.

BUCKLEY L.J. The question upon this appeal is as to the meaning of the word "wreck" in s. 158 of the Merchant Shipping

C. A. 1913

THE OLYMPIC.

Buckley L.J.

Act, 1894. If there has not been a wreck of the ship the appellants are entitled to succeed. If there has, then they fail.

The word "wreck" or "wrack," for both were originally the same, imports primarily injury, including, but not necessarily amounting to, destruction. I may speak of the wreck of a railway train, or, metaphorically, of the wreck of a woman's happiness or the wreck of a man's fortunes. The question is as to the meaning to be attributed to the word in maritime affairs. What amount of injury or destruction, and how occasioned, satisfies the words "the wreck of a ship"?

The appellants have argued that there can be no wreck of a ship unless she has touched the ground. If this were right, it would follow that a ship could never be wrecked in mid ocean unless she went to the bottom. If by collision with another vessel or by violence of the wind and the waves she was so injured as to cease to be navigable as a ship, she would not be wrecked. The contention seems to me to be impossible. It is rested solely upon authorities which, as I shall shew, have no bearing upon the question.

The word "wreck" in maritime matters is used in two senses which for the present purpose it is essential to distinguish. The first (that with which I am here concerned) is the casualty, the injurious accident, or event, which is described by the words "the wreck of the ship." The word in its other use describes goods, or something physical, which by reason of the casualty are affected in a particular manner. Goods or broken pieces of the vessel herself which in consequence of the casualty are cast into or found in the sea are described as flotsam (goods floating) or jetsam (goods thrown overboard to lighten the ship), or ligan, sometimes called lagan (goods cast overboard but buoyed so as to be capable of being recovered), or, lastly, "wreck." The characteristics of all these will be found detailed in *Sir Henry Constable's Case*. (1) As regards "wreck" in this latter sense, it is essential that the goods or articles shall have touched the ground. If they have not, they may be flotsam, jetsam, or ligan, but are not wreck. The importance of this characteristic of touching the ground was that, if the goods had ceased to float

(1) 5 Rep. 106 a.

and had stranded on the foreshore, they became subject to the land jurisdiction, whereas if that were not the case they were within the admiralty jurisdiction. The lord of the manor in the one case and the Lord High Admiral in the other might be entitled to claim them.

The cases of *The King* v. *Forty-nine Casks of Brandy* (1) and *The King* v. *Two Casks of Tallow* (2) are cases of that kind. The case of *Legge* v. *Boyd* (3) is another case of similar character, except that the question was there discussed whether the goods were wrecked because the ship was wrecked, and that led to a consideration whether the ship was wrecked. Tindal C.J. there said that "the ship remained entire." Erle J. repeated that statement, and added that after she was lightened she floated, and Maule J. said that she was repaired and might have continued her voyage. The case, therefore, whatever might otherwise have been its value, is, I think, of no assistance where the ship was so injured as that she could not have continued her voyage. I may add that that case was not decided under this Act, and has no bearing except as some guide as to what in maritime matters is understood by the words "wreck of a ship." No one of these cases gives any assistance in determining the present case, for they were all decisions upon the meaning of the word "wreck" in the sense which I secondly above stated. They throw no light upon the meaning of the word when used to describe the casualty spoken of by the words "the wreck of a ship."

I therefore reject the consideration of touching the ground as having any weight in the matter we have to decide. The one authority which deals with the meaning of "wreck" in the sense of casualty to the vessel is *The Elizabeth.* (4) The result of Sir William Scott's judgment in that case, so far as it bears upon the question here to be decided, is, I think, that, inasmuch as the vessel had encountered what he called a semi-naufragium (which, as a matter of fact, meant that she was full of water and required necessary repairs to restore her to a navigable state), the seaman's contract had terminated. The judgment goes on to decide what it was that under those circumstances the seaman

(1) 3 Hagg. Adm. 257.
(2) 3 Hagg. Adm. 294.
(3) 14 L. J. (C.P.) 138.
(4) 2 Dods. 403.

C. A. 1913

THE OLYMPIC.

Buckley L.J.

was entitled to receive—this was held to be gratuitous conveyance home (which from the statement at p. 404 seems to have been offered him) and payment of his wages until he arrived home. The decision is that the misfortune had arisen from vis major, the act of God, which neither party had in contemplation at the time of the contract, and that the circumstances vested in the master an authority to discharge the crew under proper conditions. The proper conditions or consequences of his so discharging them were then determined to be as above stated. The consequences of termination are now supplied by s. 158 of the Act of 1894, and, even if the rule in *The Elizabeth* (1) were held operative in this case, it would give them no more than they have received, for in the present case they were at home when discharged at Southampton.

I notice that, in the present case, the learned judge puts the question whether the *Olympic* was, within the meaning of s. 158, a "wreck." It follows from what I have said that this in my judgment does not accurately state the question. I have not to inquire whether the ship was a wreck, that is to say, whether she had become a certain physical thing, but whether there had been a wreck of the ship, that is to say, whether a certain casualty had happened to the ship. This is not necessarily the same question. Further, I think the question is not whether the vessel had been so injured and damaged that she ceased to be a ship of any service to the owners, but a smaller question, namely, whether she had been so injured and damaged that she ceased to be a ship of service for the purposes of the adventure, the subject of the seaman's contract.

Looking to the Merchant Shipping Act, 1894, I find that there are two sections which seem to me to deal with different subject-matters. The one is s. 162, which uses the word "discharged," meaning, as I understand it, not "paid off," but "dismissed." It is a section which reproduces s. 167 of the Merchant Shipping Act, 1854, upon which *Tindle* v. *Davison* (2) was decided, but without some words in which the expression "so improperly discharged" occur. Those words no doubt made the point more plain, but in my judgment the true construction of the

(1) 2 Dods. 403. (2) 7 Asp. M. L. C. 169.

present section is the same. The present section speaks of "without fault on his part justifying that discharge." This s. 162 deals with the case where a seaman is discharged, that is, dismissed, otherwise than in accordance with the terms of his agreement, and, under circumstances, confers upon him a right to a month's wages. This section is one dealing with the case of the employer dismissing the seaman without fault on the part of the seaman, and without the seaman's consent. The other section is s. 158, and the verb there is "terminates." The section applies in an event, namely, "where the service of a seaman terminates," and deals with that event in two aspects, first, where the termination results from something happening to the ship, and secondly, the case where it terminates from something happening to the seaman. The latter of these is unfitness or inability on the part of the seaman to proceed on the voyage. The former is "the wreck or loss of the ship." In this context the meaning to be attributed to these last words is, I think, prima facie, something which renders the ship, like the man, unfit or unable to proceed on the voyage. The section contemplates that, by reason of something for which neither party is voluntarily responsible, a case has arisen in which the agreement between the ship and the seaman cannot be performed, because either the seaman, by reason of his unfitness or inability, or the ship, by reason of the wreck or loss of the ship, has become unable to proceed on the voyage, and the service of the seaman has terminated by reason of that fact. The wreck of the ship in this context, I think, is anything happening to the ship which renders her incapable of carrying out the maritime adventure in respect of which the seaman's contract was entered into.

Under these circumstances the wreck of the ship for the purposes of the section includes, I think, such a structural injury to her hull as to render her incapable of continuing the adventure, the subject of the contract. I have purposely limited this to structural injury to the hull, because that is all that it is necessary to decide in this case. I do not say whether this is or is not exhaustive. If there has been such a structural injury to the hull as that the ship is incapable of being used as a ship for the

C. A. 1913

THE OLYMPIC.

Buckley L.J.

contemplated adventure, the words of s. 158, I think, are satisfied. It must in every case be a question of fact whether the result is such as I have stated. If, for instance, the injury be such as could be repaired within, say, twenty-four hours, it does not follow that the ship cannot perform the contemplated adventure. In every case it will be necessary to investigate what was the adventure, the subject of the contract, and whether the injury is such as that it is found as a fact that such an injury has been caused as that the ship cannot continue that adventure, notwithstanding that after repair she could perhaps perform some other adventure. The facts here are that, as the learned judge states, the *Olympic* was so seriously damaged that she ceased to be a navigable ship, and that the Board of Trade forbade her to proceed on her voyage because she was not in a seaworthy condition to do it. The facts found seem to me to shew that, as the judge says, the agreed voyage was brought to a summary and proper conclusion.

This being the case, the services of the seaman terminated under s. 158, and he was entitled to wages up to the termination, but not for any longer period. This appeal therefore fails and must be dismissed with costs.

KENNEDY L.J. This case is one of general importance. It is an appeal on the part of the plaintiffs against the judgment of Bargrave Deane J., who dismissed their claims for compensation under s. 162 of the Merchant Shipping Act, 1894.

The material facts are these. [The learned Lord Justice detailed the facts already set out, and continued:]

It is indisputable that, if the defendants are right in their contention that s. 158 is applicable to the circumstances of the present case, the plaintiffs' claims cannot be allowed. The defendants have either paid or been willing to pay them their wages up to September 22, when they were discharged at Southampton.

The question is whether the facts bring the case under s. 158, as the defendants contend, or not. Have the services of these seamen, within the true meaning of this section, terminated before the date contemplated in the agreement by reason of the

wreck or loss of the *Olympic*? Or, in other words, did that which happened to the *Olympic* constitute a wreck or loss of the *Olympic*, whereby the voyage contract of the seamen on board of her was determined, so that they could rightly be discharged by her owners without any compensation at all?

Bargrave Deane J. has held that this question must be answered in favour of the shipowners. I am unable to concur in his decision. This is a decision which so materially affects the relative rights of seamen serving under voyage contracts and of those whom they serve that I feel it to be a duty to deal with it at some length, especially as I have the misfortune to differ from my brethren in this Court as well as from the learned judge in the Court below.

I think it will be the most convenient course, for the sake of clearness, if I indicate, in the first place, the grounds of my dissent from some points in the reasoning of Bargrave Deane J.'s judgment.

After citing ss. 158 and 162 of the Merchant Shipping Act, the judgment commences with the statement that, if the *Olympic* was a "wreck," then s. 158 applies; if she was not, then it does not apply. This is true; but, at the same time, it is, in my view, important, in construing the section, not to regard that word alone, but also to consider the language which immediately precedes it. The enactment continues, and is an almost literal re-enactment of, s. 185 of the Merchant Shipping Act, 1854, and, as it seems to me, the Legislature, when, alike in the earlier and the later Act, it uses the expression "where the service of a seaman terminates before the date contemplated by the agreement by reason of the wreck or loss of the ship," is referring to two events—wreck and loss—which it regarded as being, at the time of the passing of the Act, recognized causes of termination, namely, the termination by "wreck" and the termination by "loss."

It is therefore material in seeking the true interpretation of the statute and finding out, if we can, what "wreck" denotes to consider by reason of what degree or kind of misfortune (to use a neutral word) to his ship it was, at the time of the passing of the Act of 1854, recognized that a seaman's services terminated

C. A. 1913

THE OLYMPIC.

Kennedy L.J.

before the date fixed by his agreement, by which words I understand to be intended, came automatically to a conclusion.

The learned judge, after stating the question in the words which I have quoted, proceeds to consider what "wreck" ought to be held to mean. I agree with him that we are not materially assisted by the decisions or the dicta to be found in the cases to which he refers, reported in the Law Journal and in the third volume of Haggard's Admiralty Reports. I agree that the law to be deduced from them as to "wreccum maris," which included both parts of ships and seaborne cargo, is not pertinent to our present inquiry. But when the judgment goes on to found itself upon the theory that "the words of the section are 'wreck' or 'loss'; wreck must be something short of loss . . . . a wreck is something in which the vessel falls short of being a loss," I must respectfully confess my inability to see any sort of foundation in the language of the section for such an assumption. When we read in the text of s. 158 "terminates . . . . by reason of wreck or loss," the natural and the only necessary inference, as it appears to me, is that "wreck" and "loss" refer to two events, either of which may happen to a vessel, and either of which the Legislature recognizes as terminating the services of a seaman serving on board that vessel. There is nothing in the text, grammatically considered, which warrants the learned judge's assumption that the first of the two events mentioned must be something less serious than the second. If any inference from the collocation of the words is justifiable, it is, I think, that, as "wreck" precedes "loss," the Legislature intends to say "wreck or any other kind of loss."

There are two other matters upon which stress appears to be laid in the judgment of the Court below. The first of these is the judgment of Lord Stowell in the case of *The Elizabeth*. (1) With this I think that it will be more convenient to deal somewhat later. The other matter is the requirement of the Board of Trade that the passenger and freeboard certificates should be returned to their Southampton officer. This was in the circumstances of such an accident a matter of course. The learned judge, however, relies upon this action as constituting

(1) 2 Dods 403.

in his own words "an embargo by the Board of Trade," which brought "this voyage, so far as the voyage was concerned which the men had agreed upon, to a summary and proper conclusion." If this comparison of the action of the Board of Trade to an "embargo" is just, it is in my view clear that it creates an argument in favour not of the defendants but of the plaintiffs. The embargo which prevents a laden ship from proceeding from port on her voyage does not dissolve the mariner's engagement, any more than it dissolves the contract between the shipowner and the merchant whose cargo has been loaded. Referring to such an embargo, Lord Tenterden, in his Law of Merchant Ships and Seamen, 5th ed. (1827), p. 450, 14th ed. (1901), p. 252, says: "The latter case does not in general dissolve the contract between the owners and the merchant by the law either of France or England, ... yet it may be reasonable on such an occasion to discharge the greater part of the mariners, who may readily find in other ships an employment equally beneficial to themselves, and are therefore not likely to sustain or recover special damage to any considerable amount by the non-performance of the contract made with them." In this sentence one of the greatest of judicial authorities on matters of shipping clearly indicates his opinion even in the case of the embargo of a laden ship—i.e., in the case of an obstacle to the prosecution of the voyage imposed by the Government, an obstacle of indefinite and unascertainable duration (which the detention for repairs is not)—that, while, in his own interest and in order to save himself the risk of expense, it may be a reasonable and indeed very prudent step on the part of the shipowner to discharge the greater part of the crew, yet, if that step is taken, the shipowner must compensate those whom he so discharges for the loss of the wages during the unfulfilled residue of the contract period, unless, as is likely enough, they find equally remunerative employment in another ship. And I may add that what is true of an embargo by the Government to which the ship belongs is true also of seizure for a temporary purpose by a hostile power. The same learned author at a later page, 5th ed., p. 462, 14th ed., p. 265, summarizing the judgment of the King's Bench delivered by Lord Ellenborough in *Beale* v.

C. A. 1913

THE OLYMPIC.

Kennedy L.J.

Thompson (1), says: "The Court thought it unnecessary to decide in this case whether or not the dissolution of contracts for freight and wages is the necessary effect of perfect and complete capture, where the right of the original proprietor is not re-vested by subsequent recapture nor recognised as continuing in force by any judgment or authoritative act of restitution on the part of the capturing nation; considering this as a case of hostile seizure with a view to measures of retaliation, if they should ultimately be thought just and necessary, but of subsequent restitution and abandonment of the right of seizure, on the part of the power by which the seizure had been made; and observing that there was *no case where property so dealt with had been considered as captured, or the contract, for freight, or wages*, dissolved." Briefly, then, if the action of the Board of Trade is, as the learned judge has held, to be likened to an embargo, it was not an act which operated in any way to terminate, in the eye of the law, the seaman's contract of service on board the vessel so detained. If in either case the shipowner prefers in his own interest to discharge the seamen rather than to keep them on the ship's articles so that they can have the advantage of their contract of service, he must pay compensation for such loss, if any, as they actually sustain in consequence, the amount of which by virtue of s. 162 of the Merchant Shipping Act, 1894, has now been limited to a sum not exceeding one month's wages.

I come now to the consideration of the case of *The Elizabeth* (2), which was decided by Lord Stowell in 1819. I agree with the learned judge in the Admiralty Court that it proceeds upon principles which ought to be affirmed. But in my opinion, when the case is rightly apprehended, the application of them to the facts of the present case, so far from supporting his judgment, justifies the present appeal.

The *Elizabeth* in June, 1818, sailed on a voyage from the United Kingdom to St. Petersburg and back to Portsmouth. The plaintiff was a seaman on board, engaged for the whole voyage, outward and homeward. She sailed from St. Petersburg on September 25 with a homeward cargo, and, two days later,

(1) (1803) 3 Bos. & P. 405. (2) Dods. 403.

without the default of any person, ran on a reef near the island of Gothland. After the cargo had been unloaded, she was, with much difficulty, got off the reef by the exertions of the crew and with native assistance, and was carried to Ostergam. So severe were the injuries to the *Elizabeth*, that she then filled with water, and the crew could not stay on board. "It was doubtful," in Lord Stowell's words, "whether she could at all receive such repairs as could restore her to a navigable state. It was by no means doubtful that she could not receive such repairs as would enable her to proceed till after the approach of spring in that climate had restored the seas to a navigable state." The master, seeing that, if he kept them, his owners would be put to great expense for several months, determined to discharge the members of the crew, of whom the plaintiff Brokershaw was one. The crew protested against being thus discharged before the service for which they had been engaged had ended. The master persisted, discharged them, and sent them home without paying them either the expenses of the voyage home or compensation. The plaintiff sought redress in the Admiralty Court. He claimed (1.) those expenses; (2.) wages up to the time when in fact the *Elizabeth*, after having been repaired in Sweden and sailed for Portsmouth, arrived at Portsmouth in April, 1819. What did Lord Stowell decide? So far as regards the expenses, he decided (and the present law is the same) that the plaintiff being discharged in a foreign port was entitled to the expenses of his passage home. That does not affect the present case. But he also decided that, while the master had a right in the circumstances to discharge the crew, and therefore the plaintiff was not entitled to claim wages until the actual return of the *Elizabeth* to Portsmouth in April, 1819, the exercise of the right involved a liability on the part of the shipowner not merely to pay the expenses of the homeward passage of the seamen, but also to pay compensation to them for the loss of the wages occasioned by their discharge. In other words, while he held that it was, in the language of Lord Tenterden, which I have cited in reference to the embargo, in the interests of the shipowners "reasonable" for the master to discharge the crew, the contract with the seamen was not dissolved—did not (to use the

C. A. 1913

THE OLYMPIC.

Kennedy L.J.

language of s. 158) "terminate," upon the happening of the disaster to the ship; and that if their services were terminated by the master's act, the owner thereupon became liable to pay compensation to the seaman for the loss of the wages which he could have earned on the voyage for which he had contracted to serve. That is, in principle, exactly what the plaintiffs claim to be their right in the present case; it is the right which the law has recognized in s. 162, while in the enactment limiting the amount of compensation recoverable by the provision in favour of the shipowner, that the seaman's compensation shall not exceed one month's wages. Lord Stowell, not being fettered by any such statutory limitation, awarded the plaintiffs in the case of *The Elizabeth* (1) wages up to the time of their being landed in their own country, and this was in effect, though not in intention, giving them wages for the whole of the period which the homeward voyage of the *Elizabeth* would have lasted, if she had not been damaged, for Lord Stowell (p. 410) says: "They have all that they could *have had under their first contract;* they are set down where they were taken up in their own country, and *with the same money in their pockets*, and open for fresh employment." The damage to the *Elizabeth*, be it observed, was incomparably greater than that suffered by the *Olympic* in the present case. She actually filled with water and the crew could not stay on board. In the present case the damage to the *Olympic* was damage only to a section quite small as compared with the whole hull; she remained navigable, although, until repaired, unfit for an Atlantic voyage. It was indeed very doubtful, in the case of the *Elizabeth*, whether the vessel could ever be repaired, it was never doubtful in the case of the *Olympic*, and it was, in fact, a matter only of some nine weeks, and yet in his judgment Lord Stowell would not describe even the case of the *Elizabeth* as "naufragium," "wreck," but as "semi-naufragium," "a half wreck," and, as I have said, would not hold that the services of the seamen serving on her "*terminated*" *by the disaster*, but held them to be terminable *by the owner* subject to the right—in Lord Stowell's time not a statutory but an equitable right—to be compensated for the loss by being paid wages as and for

(1) 2 Dods. 403.

C. A. 1913

THE OLYMPIC.

Kennedy L.J.

the period which I have stated from the report. The principle of the decision is that which, since 1854, has been embodied in the Merchant Shipping Acts—in s. 185 of the Act of 1854, and in s. 162 of the Act of 1894. The only just inference from his judgment in *The Elizabeth* (1) is, in my view, that if Lord Stowell had had to apply the Merchant Shipping Act, 1894, in the present case, he would have applied s. 162, and not s. 158. He would have said to the shipowners: "It is to your true interest, no doubt, to discharge your seamen, but if you do so, you are discharging them otherwise than in accordance with the terms of your contract with them, and you must therefore pay them that compensation which in such circumstances s. 162 prescribes."

I have now dealt with the points upon which the defendants in the present action rely. I proceed to deal, as shortly as the importance of this case permits, with the case, as it presents itself to me, generally. Let us consider in the first place what is the meaning of the word "wreck" in ordinary parlance and apart from the context of s. 158. Would any one, sailor or layman, say that the *Olympic*, as she lay at anchor in the Solent after the collision, or when afterwards she was navigating the waters of the Solent under steam on her way back to Southampton, was a "wrecked" ship, or describe the disaster as the "wreck" of the *Olympic?* In my view "wreck" means such disaster caused by collision with some external object, be it stationary, such as a rock, or moving, as, e.g., another ship or some substance floating in the waves, as destroys her character as a ship, and reduces her practically to the condition which, speaking from memory, I think has been judicially described in the case of a wooden ship as a "congeries of planks." I think that this is what would be ordinarily understood. If one turns to the dictionaries, I find Webster (New International Dictionary) describes "wreck" as "that which has been wrecked or is in a state of ruin; the remains of anything ruined or fatally injured." Johnson describes "wreck" as "destruction by being driven on rocks or shallows at sea; destruction by sea," and the verb "to wreck" as "to destroy by dashing on rocks or sands." Of

(1) 2 Dods. 403.

C. A. 1913

THE OLYMPIC.

Kennedy L.J.

course neither ordinary parlance nor dictionary is conclusive where we have to construe a word in a particular context. Is there any reason in this context in which we find "wreck" in s. 158 of the Merchant Shipping Act to induce us to give "wreck" not its ordinary meaning, but some less serious meaning which will under the term "wreck" include, as the defendants here contend, such damage by collision as, although it does not render the ship in-navigable, requires some two or three months' repair in order that she may safely carry passengers and cargo on an intended Atlantic voyage? In my humble judgment the context in s. 158 plainly indicates the reverse. The words are, "Where the service of a seaman terminates before the date contemplated in the agreement by reason of the wreck or loss of the ship." The maritime law as it existed at and before the time of the Act of 1854 was strict—one might almost be tempted to say harsh—towards the seaman on account of the rigidity with which the indissoluble character of his contract was maintained in the face of misfortune to the ship on which he served. The "wreck" which was held to "terminate" his service was a wreck in the fullest possible sense of the word. One quotation is, I think, a sufficient illustration. In his judgment in *The Florence* (1) Dr. Lushington had occasion to consider the seaman's contract, and in regard to shipwreck he says: "In shipwreck the contract continues so long as a plank can be saved." The judgment of the same learned judge in *The Warrior* (2) and the judgment of Lord Stowell in the well-known case of *The Neptune* (3) appear to me also to illustrate the same point.

No case has been cited, and I venture to think that no case could be found, to justify the defendants' contention (and it is a contention which they must establish in order to bring the case within s. 158) that a seaman's services terminate by reason of the "wreck" of the vessel, where the vessel remains in specie and actually navigable, although not seaworthy for the prosecution of the intended voyage without repairs being executed which will cause a considerable temporary delay. And it may be noted that in the course of his judgment in *The Elizabeth* (4) Lord

(1) (1852) 16 Jur. 573.
(2) (1862) Lush. 476.
(3) (1824) 1 Hagg. Adm. 227.
(4) 2 Dods. at p. 408.

Stowell says in regard to the law: "A total loss by wreck happens. This operates a total loss of wages." But then it is said on behalf of the defendants, if the plaintiffs' interpretation is right, why are the words "wreck or loss" used? I regret that I am unable to see the force of this comment. "Wreck" denotes destruction by the collision of the vessel with some external object, either moving or stationary. But it is not the only form of loss which the maritime law has recognized, and did recognize in 1854, when the expression found a place in s. 185 of the Merchant Shipping Act of that year, as making a termination of the seaman's services. There may be loss of the ship by fire, by internal explosion, by foundering, or, as Dr. Lushington mentions in his judgment in *The Florence* (1), by capture. "By capture certainly," said the learned judge, "if there be no re-capture, the contract (i.e., the contract between shipowner and seaman) is at once put an end to, and this, I apprehend, whether by an enemy or by pirates."

The Legislature, it seems to me, used a very natural phrase when by "wreck or loss" it intended to express all the forms of loss (of which "wreck" is the commonest) by which the law recognized that the services of the seaman, ipso facto, terminated. No decision has been cited to us to shew that any of the Courts have recognized that those services terminated upon the ship being merely damaged to an extent which requires her to undergo repairs for a period of time which is so long as to make it the interest of the shipowner to put an end to the contract and discharge the seamen. If he did discharge them, then, as Lord Stowell decided in *The Elizabeth* (2), when there was no Merchant Shipping Act which dealt with such a case, he may do so, but he must compensate them for their loss of prospective wages under their contract, unless, of course, they got other equally beneficial service elsewhere; and if he so acts now, I think that he is, upon the same principle, obliged by the Legislature to compensate them, but to a more limited extent, under s. 162 of the Merchant Shipping Act, 1894, upon which the plaintiffs are suing in the present action.

There is only one further remark which I desire to add. The

(1) 16 Jur. 573. (2) 2 Dods. 403.

C. A. 1913

THE OLYMPIC.

Kennedy L.J.

learned counsel for the defendants invited us to treat the misfortune to the *Olympic* as one which brought the adventure to an end, and the learned judge in concluding his judgment, after referring to the delivery to the Board of Trade of the passenger and freeboard certificates, and the voyage of the *Olympic* to Belfast for repairs, speaks of the "voyage, so far as the voyage was concerned which the crew had agreed upon, being brought to a summary and proper conclusion." If this is intended as the statement of a legal proposition, I respectfully dissent. In the absence of some special terms, the damage caused to the *Olympic* by collision with the *Hawke* in no way terminated or dissolved the contracts of the owners in respect of passengers or cargo; why, in point of law, should it terminate or discharge their contract with the seamen?

The voyage of the *Olympic* was delayed, but the delay, in my opinion, could not justify her owners in treating any contract with the crew as at an end, simply because it would cost them so large a sum to keep them and pay them until the *Olympic* was sufficiently repaired to proceed on an Atlantic voyage.

In my view, if they choose for their own pecuniary advantage to relieve themselves of this burden, and, in the words of s. 162, to discharge the seamen otherwise than in accordance with the terms of their agreement, i.e., before the completion of the contract voyage, that section required them to pay the compensation, not exceeding one month's wages, which they have claimed in these proceedings.

For the reasons which I have been obliged to state at greater length than I should have desired, I am of opinion that this appeal should be allowed.

Appeal dismissed.

Solicitors for appellants (plaintiffs): *Nicholls, Herbert & Co., for C. A. Emanuel & Emanuel, Southampton.*

Solicitors for respondents (defendants): *Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

T. L. M.

[IN THE COURT OF APPEAL.]

C. A.
1913
April 5, 7.

STUDLEY *v.* STUDLEY.

Practice—Divorce—Costs—Married Woman—Separate Estate—Restraint on Anticipation — Intervention — Respondent—"Opposite Party"—Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 28—*Married Women's Property Act*, 1893 (56 *&* 57 *Vict. c.* 63), *s.* 2—*Matrimonial Causes Act*, 1907 (7 *Edw.* 7, *c.* 12), *s.* 3. (1)

A wife, having presented a petition for dissolution of marriage on the ground of cruelty and adultery, in her particulars alleged that the

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(1) Sect. 28 of the Matrimonial Causes Act, 1857: "Upon any such petition presented by a husband the petitioner shall make the alleged adulterer a co-respondent to the said petition, unless on special grounds, to be allowed by the Court, he shall be excused from so doing; and on every petition presented by a wife for dissolution of marriage the Court, if it see fit, may direct that the person with whom the husband is alleged to have committed adultery be made a respondent; and the parties or either of them may insist on having the contested matters of fact tried by a jury as hereinafter mentioned."

Married Women's Property Act, 1893:

"1. Every contract hereafter entered into by a married woman, otherwise than as agent,

"(*a*) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract;

"(*b*) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and

"(*c*) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to;

Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating.

"2. In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just."

Matrimonial Causes Act, 1907:

"3. In every case, not already provided for by law, in which any person is charged with adultery with

C. A.
1913

STUDLEY
v.
STUDLEY.

adultery had been committed with M. R. An order was made on October 10, 1911, giving M. R. leave to intervene and directing her to file an answer within fourteen days. The intervener filed an answer, and at the trial the jury found that there had been no misconduct between her and the respondent, and the petitioner was ordered to pay her costs. Under her marriage settlement the petitioner was entitled to the income of realty for her life without power of anticipation. The intervener issued a summons for the appointment of a receiver of the life estate. Immediately after the conclusion of the first proceedings the petitioner presented a second petition for dissolution of marriage. This was undefended, and a decree nisi was pronounced on July 9, 1912. On July 22 an order was made by the President that the trustees of the petitioner's settlement should, notwithstanding the restraint on anticipation, pay half her income to the intervener from the date of the summons up to decree absolute, towards satisfaction of her costs. On March 18, 1913, the summons was ordered to stand over until the decree nisi had been made absolute. The petitioner appealed and the intervener gave cross-notice of appeal :—

Held, that the intervener was an "opposite party" within s. 2 of the Married Women's Property Act, 1893; that the discretionary power of the Court was not exhausted by the order of July 22, 1912 ; that the property which the Court could deal with under s. 2 was the whole property which was subject to the restraint on anticipation, and not merely the portion of the property which for the time being was effectively restrained from anticipation, that was to say, during coverture; and that the matter must be remitted to the President to be dealt with according to his discretion.

APPEAL from a decision of the President.

On December 22, 1910, Mrs. Beatrice Studley presented a petition for a decree of dissolution of her marriage with Mr. J. T. Studley on the ground of the cruelty and adultery of her husband. She was ordered to give particulars, and therein alleged that the adultery had been committed with Mrs. Muriel Roche. The husband denied all the charges, made counter-charges, and asked for dissolution of the marriage and custody of the child. On October 10, 1911, an order was made that Mrs. Roche should have leave to intervene in the proceedings and should "file answer within fourteen days." By her answer

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any party to a suit, or in which the Court may consider, in the interest of any person not already a party to the suit, that such person should be made a party to the suit, the Court may, if it thinks fit, allow that person to intervene upon such terms (if any) as the Court may think just."

the intervener denied that she had been guilty of adultery, and asked that the petition should be dismissed and for further and other relief. On February 26, 1912, the jury found that there had been no misconduct between the respondent and the intervener, a decree of judicial separation was pronounced in the petitioner's favour, and she was ordered to pay the intervener's costs, liberty being given to apply for payment out of property as to which the petitioner was restrained from anticipation. By an order of May 17, 1912, the petitioner was ordered to pay the intervener's costs, 793*l.* 14*s.* 9*d.*, within seven days. Under her marriage settlement of October 29, 1902, the petitioner was entitled in possession to the receipt of the net rents, profits, and income of freehold and leasehold hereditaments subject to a trust for sale, and of the investments representing the proceeds of sale thereof for her life without power of anticipation. The order was not complied with, and on May 31, 1912, a summons was issued for the appointment of a receiver of the petitioner's life interest.

Immediately after the conclusion of the first proceedings the petitioner presented a second petition against her husband for dissolution of marriage, which was not defended, and a decree nisi was pronounced on July 9, 1912. On July 22, 1912, an order was made by the President that the trustees of the petitioner's settlement should, notwithstanding the restraint on anticipation, pay to the intervener one half of any income which might have already accrued or might thereafter accrue due to the petitioner under the settlement from May 31, 1912 (the date of the summons), up to decree absolute, towards satisfaction of her costs, with leave to appeal and liberty to apply. On January 10, 1913, an order was made restraining the petitioner from dealing with the property until the hearing of the application for a receiver. On March 18, 1913, the President ordered the summons for a receiver to stand over until the decree nisi had been made absolute.

The petitioner appealed from the order of March 18, 1913; the intervener served cross-notice of appeal from the same order and asked that she might be appointed receiver of the petitioner's property and that the property might be sold.

C. A. 1913

STUDLEY v. STUDLEY.

Hon. M. Macnaghten, for the petitioner. There was no jurisdiction to order payment of the intervener's costs out of this property. She was not an "opposite party" within s. 2 of the Married Women's Property Act, 1893. The order of October 10, 1911, did not make her a respondent; she did not ask to be joined as a party, she was not added as a co-respondent to the petition, and no relief was asked against her. She only asked under s. 3 of the Matrimonial Causes Act, 1907, for leave to intervene.

Sect. 2 of the Act of 1893 does not give jurisdiction to apply in payment of costs the whole of this settled property; it only refers to property as to which the petitioner is, for the time being, actually restrained from anticipation, that is to say, during her present or any future coverture. When the decree is made absolute and she becomes discovert the restraint will be gone. This property cannot be attached under s. 1 of the Act of 1893, which only applies to property on which there is no restriction: *Barnett* v. *Howard* (1); *Brown* v. *Dimbleby* (2); and the question is whether it can be reached under s. 2. It cannot be said that proceedings have been instituted against the intervener by the petitioner or by anybody else; no relief was asked against her, therefore that section has no application. The intervener came forward of her own accord, she has never been made a party: *Crickitt* v. *Crickitt*. (3) She ought not to have been allowed to intervene: *Harrop* v. *Harrop* (4); *Lowe* v. *Lowe*. (5) The Court has exercised its discretion on this question of costs by the order of July 22, 1912, and cannot go into the matter a second time; the summons ought not to stand over. The order is not in the form prescribed by *Scott* v. *Morley* (6), which does not refer to property as to which there is a restraint on anticipation.

Tyldesley Jones, for the intervener. This was a liability incurred by a married woman, possessed of property subject to a restraint on anticipation, at a time when she was still a married woman, and the only course open to the intervener was to

(1) [1900] 2 Q. B. 784.
(2) [1904] 1 K. B. 28.
(3) [1902] P. 177.
(4) [1899] P. 61.
(5) [1899] P. 204.
(6) (1887) 20 Q. B. D. 120

proceed under s. 2 of the Act of 1893. The divorce proceedings were "instituted" by the petitioner—*Dresel* v. *Ellis* (1)—and were clearly against the intervener, for charges were made against her in the particulars. In self-defence she had to intervene under s. 28 of the Act of 1857 and r. 23 of the Rules and Regulations of December 26, 1865, and become a respondent. In fact she was directed to do so by the order of October 10, 1911. Therefore she was an "opposite party" within the section and entitled to a receiver and sale of Mrs. Studley's property. Whether the intervener became a party under s. 28 of the Act of 1857 or under s. 3 of the Act of 1907 is immaterial; she is a respondent to the petition presented by the wife: *Wade* v. *Wade* (*Brooke intervening*) (2); *Eden* v. *Weardale Iron and Coal Co.* (3) The intervener asks that the life estate of the petitioner should be sold and the proceeds applied in payment of the costs of the intervener. By life estate is meant the whole property to which the restraint on anticipation attaches; not merely that part of it to which it attaches effectively for the time being. If the decree is made absolute the petitioner will no longer be restrained from anticipation; and if she marries again the restraint will once more come into operation. But the property to be sold is the whole of her life interest whether she be covert or discovert. The common form of order is drawn in that way: Seton's Judgments and Orders, 7th ed., vol. ii., p. 849, Form 8. *Barnett* v. *Howard* (4) and *Brown* v. *Dimbleby* (5) were applications under s. 1 of the Act of 1893 and do not apply to cases under s. 2 with reference to restraints on anticipation. The petitioner is still a married woman, and the intervener can proceed under s. 2 of the Act of 1893, and the decision in *Pelton Brothers* v. *Harrison* (6) does not apply.

The question of costs was in the discretion of the President: Judicature Act, 1890, s. 5. Liberty to apply was added to the order of July 22, 1912, in order to keep the application under s. 2 alive and subject to this discretion. The onus is on the

(1) [1905] 1 K. B. 574.
(2) [1903] P. 16.
(3) (1887) 35 Ch. D. 287, 291.
(4) [1900] 2 Q. B. 784.
(5) [1904] 1 K. B. 28.
(6) [1891] 2 Q. B. 422.

C. A. 1913

STUDLEY v. STUDLEY.

petitioner to shew why the order should not be made: *Pawley* v. *Pawley*. (1)

Hon. M. Macnaghten in reply. The intervener is not an "opposite party." If she is a party at all she is on a side of her own; she is not opposed to the petitioner; she came in of her own accord after the pleadings were closed and asked for no relief. She was not brought in by the petitioner. Assuming that the intervener was an opposite party, it is conceded that the President had power under s. 5 of the Judicature Act, 1890, to make this order during the coverture; but the property which can be sold is only the income during coverture.

[COZENS-HARDY M.R. referred to *Baggett* v. *Meux* (2), following *Tullett* v. *Armstrong*. (3)]

The words in s. 2 "property which is subject to a restraint on anticipation" refer to income only.

COZENS-HARDY M.R. stated the facts and proceeded. Several objections are taken to the orders of July 22, 1912, and March 18, 1913. Sect. 2 of the Married Women's Property Act, 1893, says: "In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just." In the first place, it is said that this section has no application whatever in favour of Mrs. Roche. Mrs. Studley had no desire to litigate with her, she did not seek any relief against her, she was brought in contrary to her own wish; and although Mrs. Studley was made liable to pay, and properly made liable to pay, the costs to Mrs. Roche, yet, it is said, she is not an "opposite party" within the meaning of that section. I think she is an "opposite party." It seems to me when the Court made the order, under s. 28 of the Act of 1857, it did make the person who was ordered to put in an answer,

(1) [1905] 1 Ch. 593. (2) (1846) 1 Ph. 627.
(3) (1839) 4 My. & Cr. 377.

and who did put in an answer, a respondent within the meaning of that section. If the words " opposite party " include " respondent," I think the authorities, including *Eden* v. *Weardale Iron and Coal Co.* (1), are conclusive that Mrs. Roche was an opposite party within this section. So I have no doubt that the Court has jurisdiction, in a case where the intervener is properly made a party and ordered to answer, to bring s. 2 into operation.

Then it is said that the Court made an order which was limited to half the income and that only during the coverture, and the discretionary power of the Court is spent and done with; it is res judicata; it is estoppel between the parties and nothing more can she be entitled to. I do not think that contention can prevail. The judge, in his discretion, thought on the materials then before him that an order limited in time and limited in amount was all that he then ought to make, but it seems to me there is nothing whatever to prevent him, in the exercise of his discretion, having regard to the facts which had been brought before him, from saying, " I now think fit to go further than that, and I make the order dealing as far as I can, as far as the law authorizes me, with the whole property under s. 2." In my opinion, therefore, there is nothing in that objection.

The third point, which, no doubt, is an important one, is this: What is the property out of which the Court is authorized in its discretion to make an order under s. 2? In my opinion, it is that property which is subject to the restraint on anticipation and not merely that portion of the property which, for the time being, is effectively restrained from anticipation, that is to say, only during coverture. It must be remembered that under s. 1 all separate estate, where there is no restraint on anticipation, may be made available for payment of judgment debts against a married woman. It must also be remembered that the provision in s. 2 is intended to be, and is, something much wider, and I fail to see any answer to the question which has been put by Buckley L.J. to counsel: Suppose, instead of being a life interest, it had been a capital sum of 1000*l.*, what would be the property out of which the costs might be ordered to be paid? It seems to me to be quite plain that it must be out of that property which

(1) 35 Ch. D. 287.

C. A. 1913

STUDLEY v. STUDLEY.

Cozens-Hardy M.R.

is subject to restraint on anticipation, that is the whole 1000*l.*, and not merely the income of that 1000*l.* during the life of the married woman. But then it is said that that does not apply to a life interest, because the tenant for life has really nothing more than a right to receive the income as and when it accrues due, and although she cannot charge the future payments as they accrue due, she can charge arrears. The very object of this section is to get rid of that difficulty and to say that any property which the married woman has, subject to restraint on anticipation, is property, whether life interest or capital sum, which as against an opposite party in a litigation the Court may in its discretion think fit to be applied for the purpose of paying costs. I do not think that it is for us to do more than to express, as I have endeavoured to do, what it is competent for the learned President in his discretion to do in this matter. It is not for us to exercise that discretion. It will be for him to consider all the circumstances of the case, remembering, as has been laid down in *Pawley* v. *Pawley* (1), that the onus is upon the married woman to say why an order should not be made. He may, if he thinks fit, order a sale of the entirety of this life interest or he may not. I do not wish to indicate what my view is as to what he should do. I do not really know enough about the means of the family or the circumstances or anything of the kind. All we can do, I think, is to dismiss this appeal and the cross-appeal, having intimated what in our view are the limits of the discretion imposed upon the judge and what he may do if he thinks fit.

BUCKLEY L.J. There are two questions. Both arise under s. 2 of the Married Women's Property Act, 1893. The first question is under the introductory words to the section. Mrs. Roche was added as a party to a petition presented by Mrs. Studley for divorce from her husband, in which petition Mrs. Studley had alleged by her particulars that Mr. Studley had committed adultery with Mrs. Roche. There are two sections under which Mrs. Roche might have been so made a party. One is s. 28 of the Act of 1857. That is a section under which the

(1) [1905] 1 Ch. 593.

Court may, if it sees fit, direct that the person with whom the husband is alleged to have committed adultery be made a respondent. The other section is s. 3 of the Matrimonial Causes Act, 1907, which provides that "In every case, not already provided for by law, in which any person is charged with adultery with any party to a suit, or in which the Court may consider, in the interest of any person not already a party to the suit, that such person should be made a party to the suit, the Court may, if it thinks fit, allow that person to intervene upon such terms (if any) as the Court may think just." Mrs. Roche has been brought into the divorce proceedings and it has been in debate between counsel before us as to whether she was brought in under s. 28 of the Act of 1857 or under s. 3 of the Act of 1907. To my mind it is immaterial whether she came in under the one or the other. If she came in under s. 28, she was made a respondent,—that is the language of that section—and if she was made a respondent, she has become a respondent to a petition in which Mrs. Studley is petitioner. Certainly, if that is so, she would be a "party." If she is brought in under s. 3 of the Act of 1907, then if the Court considers that she should be made a "party to the suit" (those are the words of the section) the Court may allow her to intervene. Upon that language it seems to me that if the Court allows the person to intervene, it makes that person a party to the suit. So far it seems to me that Mrs. Roche has become a party. Then has she become an "opposite party"? It is quite true that Mrs. Studley has not instituted a suit against Mrs. Roche, but that is not required for the purposes of s. 2 of the Act of 1893. What I have to inquire is whether, in an action instituted by Mrs. Studley, which certainly this is, Mrs. Roche has become an "opposite party." I have shewn that she has become a party. By what term am I to describe her? Is she an opposite party, or a party on the same side as the petitioner, or does she occupy an ambiguous position of some sort in the middle? To my mind, she is not on the same side as Mrs. Studley, neither does she occupy any ambiguous position in the middle; she is an "opposite party" denying the statement which Mrs. Studley is affirming, namely, that she has committed adultery with Mr. Studley.

C. A. 1913

STUDLEY v. STUDLEY.

Buckley L.J.

Therefore I think, for the purposes of the Act of 1893, Mrs. Roche is an "opposite party."

The second question is this: whether, she being an "opposite party," there was jurisdiction in the judge by judgment or order from time to time to order payment of her costs out of property which is subject to a restraint on anticipation, and to enforce payment of those costs by a receiver or sale of the property or otherwise. What is the property under s. 2? Under s. 1 of that Act, upon the language of the section, and from the decisions of this Court in *Barnett* v. *Howard* (1) and *Brown* v. *Dimbleby* (2), it is plain that a married woman's contract binds only separate property which she was at the date of the contract or thereafter possessed of or entitled to, not subject to a restraint on anticipation. In clause (*b*) it is quite plain that the words "at that time or thereafter" mean at or after the date of the contract. When I come to the same words "at that time or thereafter" at the end of the section, they must mean the same thing. The result of that is that the married woman's contract is enforceable only against separate property which she was possessed of or entitled to at or after the date of the contract and which was not subject to a restraint on anticipation. Sect. 2 is different. In the case of costs which she is ordered to pay, there is jurisdiction to order payment of them out of property which is subject to a restraint on anticipation. The argument which has been pressed before us is this: A married woman is entitled to property subject to restraint on anticipation. She may become discovert and she may become covert again. You must, it is said, divide her property, be it a life interest or an absolute estate, into (*a*) that portion of her enjoyment during which she is under coverture and (*b*) that portion of her enjoyment during which she is not under coverture, and all you can bind under this s. 2 is so much of her life interest or other interest so subdivided as is from time to time subject to restraint on anticipation. It seems to me that is an impossible contention. You are going to sell this property. Is it possible to sell something which is such that the purchaser will be entitled when the married woman is, and

(1) [1900] 2 Q. B. 784. (2) [1904] 1 K. B. 28.

will not be entitled when she is not, under coverture? If you look at the language of the section it is impossible. What does the word "property" mean in the section? Supposing the property in question be 1000*l.* Consols in which the married woman has a life interest or an absolute interest subject to a restraint on anticipation. Let me assume for the moment that "property" means her property in that sum during such time as she is under coverture to the exclusion of her property in it during such time as she is discovert. Making that assumption, I have to read that meaning of the word "property" into the words the "property which is subject to a restraint on anticipation." Putting those words in, the section will run "out of such part of her property as is her interest during the time when she is restrained from anticipation" and then go on "which is subject to a restraint on anticipation." The words are thus duplicated and inserted twice over. All the property of which you are speaking is subject to restraint on anticipation if that is the meaning of the word "property" and it is idle to add the second time "which is subject to a restraint on anticipation." It is obvious that the word "property" in this section means not such interest of the married woman as is restrained while she is under coverture, but the property, the 1000*l.* Consols, as to which she may from time to time be restrained or not restrained, according as she is under coverture or not. That is the thing which you can sell and that is the thing of which you can appoint a receiver; in other words, that is the thing which you can reach so as to provide for the payment of the costs. Here the married woman is entitled to an interest of that description. The present application is an application for sale of that interest, and it is said that as the previous order gave only one half of the income during such period as she is under coverture, the matter ought to stop there. I think that not only during coverture, but also when the married woman is discovert, this property is capable of being reached, and that the learned President, who ought to determine this matter, has a discretion under this section to say whether under all the circumstances of the case he thinks it right that the property, when she has become discovert after the order absolute has been made, shall

C. A. 1913

STUDLEY v. STUDLEY.

be reached for the purpose of ordering the payment of the costs by her. With this intimation of opinion, the order will be that the appeals will be dismissed and the matter be remitted to the judge to deal with the summons.

Appeals dismissed.

Solicitors: *Michael Abrahams & Co.; Pontifex, Pitt & Johnson.*

H. C. R.

C. A. 1913 *April* 21; *May* 9, 30.

[IN THE COURT OF APPEAL.]

THE CAP BLANCO.

[1913, Folio 184.]

Admiralty—Damage to Goods—"Carried into any port in England"—Jurisdiction—Bill of Lading—Arbitration Clause—Admiralty Court Act, 1861 (24 *Vict. c.* 10), *s.* 6—*Arbitration Act,* 1889 (52 *& 53 Vict. c.* 49), *s.* 4.

The plaintiffs, under a bill of lading, giving liberty to call at intermediate ports, and providing that any disputes as to its interpretation were "to be decided in Hamburg according to German law," shipped, at Hamburg, on board a German steam vessel, owned by the defendants, ten cases of gold coin for delivery to the order of the plaintiffs at Monte Video or Buenos Aires. The vessel called at Southampton on the way out, and on her arrival at Monte Video only nine of the cases were delivered. On the return voyage to Hamburg the vessel again put into Southampton, where she was arrested on behalf of the plaintiffs in an action for breach of contract or duty in respect of the missing case. On objection by the defendants to the jurisdiction of the English Court:—

Held by the President (Sir Samuel Evans), that under the words "goods carried into any port in England" in s. 6 of the Admiralty Court Act, 1861, the Court had jurisdiction to arrest the vessel and entertain the action; but that the proceedings must be stayed in order that the parties might litigate in Germany, as the clause in the bill of lading (set out above) amounted to a submission within the meaning of s. 4 of the Arbitration Act, 1889. The plaintiffs appealed against the order to stay:—

The Court of Appeal (Cozens-Hardy M.R. and Kennedy L.J.) allowed the plaintiffs to withdraw the appeal on the defendants undertaking to waive a clause in the bill of lading rendering proceedings in Germany out of time.

INTERLOCUTORY APPEAL by plaintiffs, the Anglo-South American Bank, Limited, against an order of the President (Sir Samuel Evans), staying proceedings, under s. 4 of the Arbitration Act,

1889, pending litigation in Hamburg, in an action for breach of contract or duty brought in England against the respondents (defendants), the Hamburg South American Steam Navigation Company, owners of the German steam vessel *Cap Blanco*, in respect of the non-delivery at Monte Video of a case of gold coin valued at 4950*l*.

The case is reported, first, on the question of jurisdiction to entertain the action, depending on the construction to be placed on the words "carried into any port in England" in s. 6 of the Admiralty Court Act, 1861 (1), and, secondly, as to the application of s. 4 of the Arbitration Act, 1889 (2), to the terms of clause 14 of the bill of lading under which the goods were carried. (3)

The case was heard in the Court below on April 21, 1913, and, on May 9, the following considered judgment was delivered, in which all the material facts, the arguments of counsel, and the cases cited are set out.

THE PRESIDENT (SIR SAMUEL EVANS). In this action the plaintiffs, as owners of certain cases containing German gold

(1) 24 Vict. c. 10, s. 6: "The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of, or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales . . . ."

(2) 52 & 53 Vict. c. 49, s. 4: "If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings, and that Court or a judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

(3) Clause 14: "Any disputes concerning the interpretation of the bill of lading are to be decided in Hamburg according to German law."

C. A. 1913

THE CAP BLANCO.

The President.

coin, sue the defendants for damages for breach of duty or of contract in respect of the non-delivery at Monte Video or Buenos Aires of one of such cases and its contents, which were shipped on the *Cap Blanco* under a bill of lading dated December 10, 1912.

The vessel was arrested in the action on April 4, 1913, at Southampton, and was released on the undertaking of the defendants' solicitors to appear under protest and to put in bail. Appearance was entered under protest, and the undertaking to put in bail was given in due course.

The defendants issued a summons asking that the service of the writ and warrant of arrest, and the undertaking to put in bail, should be set aside on the ground that this Court has no jurisdiction to entertain the action or to arrest the vessel; or, alternatively, that all further proceedings should be stayed under s. 4 of the Arbitration Act, 1889; or, alternatively, on the ground that the Court in Hamburg is a more convenient tribunal for the trial of the action.

The summons was adjourned into Court for argument. The material facts are as follows: The plaintiffs are the owners and consignees of the case of gold coin in question, which was shipped by them on the *Cap Blanco*, a German vessel, under a bill of lading which was made in Hamburg between the plaintiffs and the defendants by their agents and is in the German language. A translation duly verified has been supplied to me. It shews that the defendants received from the plaintiffs in external good condition for shipment per the steamship *Cap Blanco*, or another steamer from Hamburg bound to Monte Video, option Buenos Aires, with liberty to call at any places for discharging and loading goods, cattle, or passengers, the goods stated in the margin, namely, German gold coin in cases which are to be marked and numbered as stated for delivery to the plaintiffs or order in Monte Video, option Buenos Aires, therein called the place of destination, under the following conditions (inter alia): (1.) The company (i.e., the defendant company) has the right to tranship, land, and reload the merchandise by one of their vessels or any other vessel or by any other means of transport, and all vessels have the right to touch once or several times at

any places in any sequence whether in accordance with the itinerary or exceptional ones. The bill of lading contains other clauses dealing with exceptions and other matters. Clause 14 provides that "any disputes concerning the interpretation of this bill of lading are to be decided in Hamburg according to German law."

The case of gold in question was shipped in accordance with the bill of lading on the *Cap Blanco* at Hamburg. The vessel proceeded on her voyage and called at Southampton on December 11, 1912, with the case on board. She arrived subsequently at Monte Video, when all the cases except the one in question were delivered. After the discharge of her cargo in South America the *Cap Blanco* proceeded on her return voyage to Hamburg. On this return voyage she called again at Southampton, when she was arrested, as already stated, at the suit of the plaintiffs on April 4. The *Cap Blanco*, it appears, calls regularly in the ordinary course of business at Southampton on her passages from Hamburg to South America and back.

The question whether or not this Court has jurisdiction to entertain the action and to arrest the vessel depends upon the construction of s. 6 of the Admiralty Court Act, 1861. That section reads as follows: [The learned President read the section already set out, and continued:] The 35th section of the same Act enacts that the jurisdiction conferred by the Act may be exercised either by proceedings in rem or by proceedings in personam.

The decision in this case turns on the question whether or not, in the circumstances above stated, the goods in question were "carried into" the port of Southampton within the meaning of s. 6. If they were so carried this Court had jurisdiction to arrest the *Cap Blanco*, and can entertain the action; otherwise there is no such jurisdiction, for, apart from the provisions of the Act, the Admiralty Court had no power to entertain a suit in rem in the circumstances.

The sections referred to have been the subject of many judicial decisions in this Court. I have taken the opportunity of looking into all of them. Most of them have been cited and

C. A. 1913

THE CAP BLANCO.

The President.

dealt with in the decision of the Privy Council in the case of *The Piéve Superiore*. (1) The general object and scope of the statute was described by Dr. Lushington in *The St. Cloud* (2) and in *The Bahia*. (3) The result of the authorities is that s. 6 of the Act was intentionally framed in large and general terms and ought to be construed with as great latitude as possible within the fair meaning of the words, on the ground that "the statute, being remedial of a grievance, by amplifying the jurisdiction of the English Court of Admiralty, ought, according to the general rule applicable to such statutes, to be construed liberally so as to afford the utmost relief which the fair meaning of its language will allow." (4)

The cases were so fully dealt with in the Privy Council in the decision last referred to that it is quite unnecessary for me to discuss them further. In some of the cases the goods were only "carried into" an English port by reason of casual or fortuitous circumstances entirely extrinsic to the contract of carriage. Nevertheless it was held that jurisdiction existed in this Court. It is wholly unnecessary in order to found the jurisdiction under the statute that the goods should be carried into an English port for the purpose of delivery, or in pursuance of the contract; but, in the case now before the Court, the gold coin was carried into Southampton—not for the purpose of delivery it is true, but in full accordance with the contract. It might then have been transhipped and reloaded into any other of the defendants' vessels, or, indeed, any other vessel, under the express terms of the contract itself. Southampton was a regular and contractual port of call of the defendants' vessel, and the vessel and the goods it carried had the advantage of the facilities and the protection afforded by that port. The port was used by the defendants and their vessel in the ordinary course of their shipping business as a port of call on the outward and homeward voyage, and the vessel while there enjoyed the privilege and protection of English law in an English harbour. It does not need a construction of unusual or strained latitude in these

(1) (1874) L. R. 5 P. C. 482.
(2) (1863) Br. & L. 4.
(3) (1863) Br. & L. 61.
(4) *The Piéve Superiore*, L. R. 5 P. C. 482, at p. 492.

circumstances to decide that the goods in question in the defendants' vessel were "carried into an English port" within the meaning of the section which confers jurisdiction on this Court. I therefore decide that this Court had jurisdiction to arrest the vessel and to entertain this action.

Some point was made that there was no breach of duty or of contract before the goods were carried into Southampton. It does not appear where the breach of duty took place: for aught I know it may have been in Southampton itself. No case has decided that the breach of duty or of contract must take place, and the cause of action must have arisen, before the goods were carried into a port in England, and to say that that must be so would be to place a limitation upon the jurisdiction which the authorities and the section do not justify, and introduce into the section words which are not to be there found.

There remains to be considered clause 14 of the bill of lading, which provides that any disputes concerning the interpretation of the bill of lading are to be decided in Hamburg according to German law. It appears from the affidavit of their solicitor that the defendants contend that they are protected from liability for the claim in this action by the exceptions contained in the bill of lading, and this action involves in my opinion a dispute concerning the interpretation of the bill of lading, within the meaning of clause 14.

The authorities cited, namely, *Law* v. *Garrett* (1), *Austrian Lloyd Steamship Co.* v. *Gresham Life Assurance Society, Ld.* (2), *Logan* v. *Bank of Scotland* (*No.* 2) (3), and *Kirchner & Co.* v. *Gruban* (4), appear to me to establish the proposition that such a clause is to be treated as a submission to arbitration within the meaning of s. 4 of the Arbitration Act, 1889. The tribunal at Hamburg is not specified, but a fair businesslike reading of the contract means that such disputes are to be tried by the competent Court in Hamburg, and in accordance with German law. It is conceivable that the parties agreed to that clause in the bill of lading in order expressly to avoid a trial here under the jurisdiction which I decide exists in this Court.

(1) (1878) 8 Ch. D. 26.
(2) [1903] 1 K. B. 249.
(3) [1906] 1 K. B. 141.
(4) [1909] 1 Ch. 413.

C. A. 1913

THE CAP BLANCO.

The President.

In dealing with commercial documents of this kind, effect must be given, if the terms of the contract permit it, to the obvious intention and agreement of the parties. I think the parties clearly agreed that disputes under the contract should be dealt with by the German tribunal, and it is right to hold the plaintiffs to their part of the agreement. Moreover, it is probably more convenient and much more inexpensive, as the disputes have to be decided according to German law, that they should be determined in the Hamburg Court.

Although, therefore, this Court is invested with jurisdiction, I order that the proceedings in the action be stayed, in order that the parties may litigate in Germany, as they have agreed to do. The defendants will have the costs of the summons.

The appeal of the plaintiffs against the order of the President staying proceedings was set down in the interlocutory list before the Master of the Rolls and Kennedy L.J.

1913. May 30. *Compston, K.C.*, and *Mackinnon*, for the appellants (plaintiffs), the Anglo-South American Bank.

Laing, K.C., and *C. Robertson Dunlop*, for the respondents (defendants), the owners of the *Cap Blanco*.

After the opening by counsel for the appellants (plaintiffs), the appeal was, by leave, withdrawn, the respondents (defendants) undertaking, in respect of proceedings in Hamburg, to waive clause 13 of the bill of lading, by which claims for compensation "must be made in Hamburg within two months after the notification at the port of destination, otherwise any claim to compensation lapses." Appellants (plaintiffs) to pay the costs of the appeal.

Solicitors for the appellants (plaintiffs), the Anglo-South American Bank, Limited: *William A. Crump & Son.*

Solicitors for the respondents (defendants), the owners of the steamship *Cap Blanco*: *Stokes & Stokes.*

T. L. M.

GRANT (FALSELY CALLED GIANNETTI) *v.* GIANNETTI. 1913

June 16.

Nullity—Void Marriage—Bigamy—Decree Nisi—Delay in applying for Decree Absolute.

A decree nisi can be made absolute notwithstanding a long delay, when the delay is explained, and especially in a case where, if the petition were dismissed, the petitioner would, as of right, be entitled to a decree on filing a fresh petition on the same ground and on proving the same facts, and would also, in due course, be entitled to have the decree made absolute.

THIS was an application to make a decree nisi absolute. It was unopposed and was called on by the registrar in Court as a special application, although inserted in the ordinary list of cases in which the decrees were to be made absolute.

On April 12, 1904, the petitioner was granted a decree nisi of nullity of marriage on the ground of the respondent's bigamy with the petitioner.

The petitioner filed an affidavit in support of the application, setting out the reasons for the delay. In it she stated, inter alia, that she had gone abroad soon after the decree nisi was pronounced, and had remained there ever since; that at the urgent request of certain relatives of hers and in order to avoid further publicity for the sake of the two children, issue of the bigamous marriage, she had refrained from taking any further steps, having been under the impression that she could apply to have the decree nisi made absolute at any time; and that her reason for applying now was her desire to clearly establish her status in the country in which she was residing, namely, Switzerland, which was also the country where the bigamous ceremony of marriage was performed.

Durley Grazebrook, for the petitioner. This marriage was wholly void. The facts proved shewed that the respondent had a wife living at the time: the wife herself gave evidence. The Court cannot refuse a decree in such a case: *Andrews* (*falsely*

1913

GRANT v. GIANNETTI.

called Ross) v. *Ross*. (1) Neither could the King's Proctor intervene in such a case on any ground.

[SIR SAMUEL EVANS, PRESIDENT. In the case cited, the delay was in taking proceedings: here, the delay is after the decree nisi.]

If the Court were to refuse to make this decree absolute, the only result would be that the petitioner would, on presenting a fresh petition on the same ground, be absolutely entitled to a decree, which in due course would be made absolute.

SIR SAMUEL EVANS, PRESIDENT, granted the petitioner's application and made the decree absolute.

Solicitors: *Gibson & Weldon.*

H. D. G.

1913

June 30.

CAVENDISH *v.* CAVENDISH.

Divorce — Practice—Decree Nisi — Petition for Permanent Maintenance of Petitioner and Allowance for Children—Inquiry and Report—Motion to, confirm Report—Matrimonial Causes Act, 1907 (7 *Edw.* 7, *c.* 12), *s.* 1 *sub-s.* 2—*Decree not yet made absolute—Order, nunc pro tunc.*

The Court has power, under s. 1 of the Matrimonial Causes Act, 1907, before a decree nisi for dissolution of marriage has been made absolute, to confirm the report of the registrar recommending maintenance for the wife, and to order the husband to pay, after the decree shall have been made absolute, the amount of maintenance by monthly or weekly sums.

THIS was a motion to confirm the report of the registrar upon a petition for permanent maintenance.

The wife (petitioner) obtained a decree nisi on July 22, 1912, with an order for the custody of the two children (daughters) aged respectively six and four years.

The petition for permanent maintenance of the wife and allowance for the children was filed on July 29, 1912.

From the report of the registrar, dated June 10, 1913, it

(1) (1888) 14 P. D. 15.

appeared that under an indenture of settlement executed upon a previous marriage of the respondent he was entitled to an income of 600*l.* per annum, "such income being subject to a spendthrift clause," and that a substantial portion (amounting, it was said, to about one half of the said income) he was now applying in reduction of outstanding debts and liabilities.

In view of this, the registrar submitted "that the respondent be ordered to pay to the petitioner, as from the date of the decree being made absolute, the sum of 200*l.* a year by equal quarterly payments for the maintenance of herself and the two children of the marriage."

Barnard, K.C., and *W. O. Willis*, for the petitioner, moved to confirm the report, but suggested that the payments should be made monthly (instead of quarterly) in conformity with the words of the Matrimonial Causes Act, 1907, s. 1, sub-s. 2.(1)

Bayford, for the respondent, raised no objection to the suggested alteration in the periods of payment, assuming that any order were now to be made; but he submitted that, inasmuch as this order was asked for and must be made, if at all, in this case, under sub-s. 2 of s. 1 of the Act of 1907, there was no jurisdiction to make the order until the decree had been made absolute. [He also took exception as to the amount recommended by the registrar; but the decision on this matter, being purely a question of fact, does not call for any report.]

Barnard, K.C., in reply. This order can be made now, equally with an order for security under sub-s. 1. Security cannot be asked for in the present case, by reason of the spendthrift clause in the settlement under which the respondent's income is derived. All that the Court is asked to do is to make an order that will

(1) The Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), s. 1, sub-s. 2, is as follows: "In any such case" (i.e., on any decree for dissolution or nullity of marriage) "the Court may, if it thinks fit, make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sum for her maintenance and support as the Court may think reasonable, and any such order may be made either in addition to or instead of an order under the last preceding sub-section" (which deals with secured payments).

1913

CAVENDISH v. CAVENDISH.

take effect upon the decree being made absolute. [He referred to *Midwinter* v. *Midwinter* (1) and *Waterhouse* v. *Waterhouse*. (2)]

SIR SAMUEL EVANS, PRESIDENT. It is conceded that I could make this order if the decree nisi had been made absolute, and that the decree in this case can be made absolute at any time.

I see no difficulty in making the order to-day nunc pro tunc, and I accordingly confirm the recommendation of the registrar, with the alteration suggested here of monthly, instead of quarterly, payments, to comply with the phraseology of the Act.

The order to pay will of course not take effect until after the decree has been made absolute.

Solicitors for petitioner: *Bower, Cotton & Bower.*

Solicitors for respondent: *Henry Pumfrey & Son.*

(1) [1892] P. 28. (2) [1893] P. 284.

H. D. G.

THE GLENMORVEN.

1913
April 2, 3.

[1913 G. 178.]

Admiralty—Salvage—Towage—Abandoned Vessel—Derelict—Quantum meruit —Conditions substituting Salvage for Towage.

The plaintiffs contracted for the sum of 400*l.* to tow the defendants' rudderless steamship from Vigo to the Tyne "no cure no pay, no claim to be made for salvage." Whilst the towage was proceeding the master and crew of the steamship left her, and the tug, with other assistance, took the steamship first to Falmouth and then on to the Tyne:—

Held by the President (Sir Samuel Evans), that the contract was to tow, with the assistance of another tug, from Vigo to the Tyne, a partially disabled vessel, with her master and crew on board; that the contract came to an end through the fault of those in charge of the steamship, for though the vessel was not technically a derelict, as the tug was in attendance under contract, still as the master and crew, without sufficient justification, had abandoned her, from that time the services rendered by the tug were not performed under contract but were in the nature of salvage for which, on a value of 11,711*l.*, the award would be 1400*l.*, and, on the basis of a quantum meruit, 300*l.* for the previous services.

Consolidated Actions of Salvage.

The plaintiffs were:

1. The owners, master, and crew of the steam tug *George V.*

2. Jasper Fittock, Anthony Barker, John Bickford, Falmouth pilots, Bert Cox, and John Lowry, crew of No. 1 Falmouth pilot cutter.

3. The Falmouth Towage Company, Limited, and the master and crew of the tug *Dragon.*

The defendants were the owners of the steamship *Glenmorven*, of Leith, her cargo and freight.

The case is reported on the question of the effect of intervening circumstances in engrafting a claim in the nature of salvage upon, or superseding, a contract of towage.

The *Glenmorven* is an iron screw steamship of 2812 tons gross register, with engines of 222 horse power nominal, and manned by a crew of twenty-six hands. At the time of the commencement of the services hereinafter mentioned she was lying at Vigo, having been towed into that port on December 22, 1912, in the course

1913

THE GLEN-MORVEN.

of a voyage from Port Breira to the Tyne with a cargo of iron ore. She had previously grounded at Port Breira and lost her rudder. Temporary repairs had been effected at Algiers; but, on resuming her voyage, her rudder had again carried away.

On December 31, the managing owner of the *Glenmorven* telephoned to the owners of the *George V.* to inquire if they had a tug available to proceed to Vigo and, in company with another tug, assist the *Glenmorven* to the Tyne. At a subsequent interview the following written agreement, dated January 2, 1913, between the tug owners and the steamship owners, was entered into at Newcastle-on-Tyne:—

"Messrs. Robert Redhead & Son, tug owners, Quayside Newcastle-on-Tyne, agree with Wm. Coupland & Co., of Newcastle-on-Tyne, to tow or assist in steering the s.s. *Glenmorven* from Vigo to the Tyne (Jarrow) per their tug *George V.* for the sum of 400*l.* (four hundred pounds) including use of tug's hawsers, no cure no pay; no claim to be made for salvage. *George V.* to leave the Tyne to-night for Vigo and to proceed there with all despatch."

The *George V.* is a steel screw steam tug of 188 tons gross register built in 1910 and fitted with triple expansion engines of 85 horse power nominal working up to 750 horse power indicated. She was manned by a crew of nine hands, and her master and chief engineer were in possession of a master mariner's and a chief engineer's certificate respectively. The tug, valued at 10,000*l.*, left the Tyne as arranged and arrived at Vigo on January 10, having been delayed by heavy weather. On the morning of January 14, the weather having moderated, the *Glenmorven* left Vigo, under her own steam, with the *George V.* towing ahead, and a Dutch tug, the *Poolzee*, made fast astern. Owing to an increasing wind and a rough sea the steamship rolled and sheered heavily with the result that in the afternoon the manila hawser of the *George V.* parted, one of the crew of the tug being injured. On the next day the *Glenmorven* continued steaming ahead with the *Poolzee* steering, and, on the following day, the *George V.* made fast again, but, after half an hour's towage, the rope again parted, and it was not until the morning of the 18th that towage recommenced; but this was

1913

THE GLENMORVEN.

interrupted on the following day by the breaking of the rope. By January 21 the weather had again moderated, and towage was resumed; but the hawser parted, and, on January 22, the master and crew of the *Glenmorven* went on board the *Poolzee*, which cast off, and proceeded to Ferrol. The master and two firemen of the *George V.* then boarded the *Glenmorven*, but could not find any provisions, and, on the afternoon of the same day, they having returned to the tug, towage was resumed. On January 24 a supply of provisions was obtained from a passing steamship. On January 27 the Lizard light was sighted, and two pilots having boarded the vessel, the *Glenmorven*, with the assistance of the tug *Dragon*, was, on the afternoon of that day, anchored in Falmouth Harbour.

On January 28 the tug *Poolzee* arrived, without the crew of the *Glenmorven*, and on February 1, a fresh crew of ten hands having been put on board, the steamship proceeded in tow of the *George V.* and the *Poolzee*, and on February 7 arrived off the Tyne, where the tug *Comet* was made fast astern, and, on the same day, the *Glenmorven* was safely moored at Jarrow.

It was contended on behalf of the *George V.* that the services rendered by those in charge of that tug were very arduous and of a highly meritorious character; that, after the *Glenmorven* had been abandoned by her master and crew, the labour involved and the peril incurred in rendering the services were quite exceptional, and that there was great risk in approaching a derelict in the heavy seaway; that the 370 miles towage lasting six days to Falmouth of a rudderless laden steamship was a remarkable feat, and that the owners of the *George V.* had incurred expenses and the tug had sustained damage to the extent of 358*l.* 8*s.* 10*d.*

On behalf of the *George V.* it was further contended that the abandonment of the *Glenmorven*, on January 22, put an end to the contract of towage, and that they, as plaintiffs, were entitled to be rewarded for the whole of the services on a salvage basis, or, alternatively, that they were entitled to a quantum meruit in respect of towage services rendered up to and including those of January 21, and to salvage remuneration in respect of services after that date.

1913

THE GLEN-MORVEN.

On behalf of the owners of the *Glenmorven* it was urged that, notwithstanding the grounding at Port Breira, the hull of the vessel was tight, her engines were in order, and, save that she was without a rudder and unable to steer, she was seaworthy; that the *George V.* was not entitled to claim salvage as the services were rendered under a written contract for a certain reward; that if any circumstances intervened not contemplated by the contract they arose from the *George V.* not being provided with a fit and proper towing hawser, and that the *George V.* was in charge of a master not experienced in ocean towages. The owners of the *Glenmorven* counterclaimed against the owners of the *George V.* for damage sustained by reason of the breach of contract, negligence, and improper conduct on the part of those in charge of the tug, and for the expenses incurred in Falmouth, as well as for any salvage and costs they might be ordered to pay to the plaintiffs in the other actions.

The appraised value of the *Glenmorven* was 9260*l.*, and that of her cargo and freight 2301*l.* and 150*l.*, total 11,711*l.*

1913. April 2, 3. *Bateson, K.C.*, and *H. M. Robertson*, for the plaintiffs, the owners, master, and crew of the steam tug *George V.*

A. Bucknill, for the plaintiffs, the pilots and the crew of the No. 1 Falmouth cutter, and for the plaintiffs, the owners, master, and crew of the tug *Dragon*.

Laing, K.C., and *D. Stephens*, for the defendants, the owners of the *Glenmorven*, her cargo and freight.

The arguments of counsel sufficiently appear from the above statement and from the judgment. In addition to the case mentioned in the judgment the following were referred to:—*Appleby* v. *Myers* (1); *The Liverpool* (2); *O'Neil* v. *Armstrong, Mitchell & Co.* (3); *The Marechal Suchet* (4); *The West Cock* (5); Kennedy (Lord Justice) on the Law of Civil Salvage (2nd ed.), pp. 107, 137.

THE PRESIDENT (SIR SAMUEL EVANS). A number of interesting points of law and interesting issues of fact have been raised

(1) (1867) L. R. 2 C. P. 651.
(2) [1893] P. 154.
(3) [1895] 2 Q. B. 70.
(4) [1911] P. 1.
(5) [1911] P. 208.

1913

THE GLEN-MORVEN.

The President.

in this case, but I do not think it is necessary to deal with all of them—certainly not to deal with them seriatim—and I will give the general conclusions at which I have arrived upon the questions of law and issues of fact.

The claim—I am going first to deal with the main claim, that of the *George V.*—is a salvage claim. Various answers are made. Counsel for the defendants raised the point that the plaintiffs had contracted for salvage at a certain figure, and that if they were entitled to salvage at all they were only entitled to 400*l.* and nothing more; and further that, in the circumstances of this case, they were not entitled to any salvage at all.

In my view this contract must be read in reference to the circumstances in which it was made, in order to arrive at what agreement the parties intended to make, taking care to do no violence to the language of the contract, and taking care not to introduce into it anything which it did not contain, or to create any variation of the written terms to which the parties agreed. This contract is in my opinion a contract to tow a partially disabled vessel, with her master and crew on board and with the assistance of another tug, from Vigo, where she had been lying disabled, to the Tyne, her port of destination. If that is the real meaning of the contract, then, having regard to the facts as they stood on January 22, I think it is clear that contract came to an end; and I think it is also clear on the evidence that it came to an end through the fault of those for whom the defendants are responsible. A contract to tow a partially disabled vessel in these circumstances is one thing. A contract to tow a vessel which has been entirely abandoned in the Bay of Biscay is a wholly different contract. Now, the vessel was abandoned in fact. No contest can arise upon that now, because the telegram sent by the master of the *Glenmorven* is perfectly clear and distinct, and the conduct of the master and crew make it, if necessary, still clearer: "Abandoned the ship at sea. Crew refused to proceed further. Landed at Ferrol by *Poolzee*." There is no suggestion there that the ship was left only temporarily, and was left in charge of a tug which was under a legal obligation to go on towing. It said: Ship abandoned at sea. Crew refused to proceed further. Landed at Ferrol by *Poolzee*. That is exactly what

1913

THE GLEN-MORVEN.

The President.

happened. It is perfectly clear that the master and crew had decided not to go back; and we find that when the *Poolzee* does go back, either for the purpose of trying to get salvage or to complete her contract, with a stock of provisions for herself and for the other tug, she does not take the master or a single member of the crew of the *Glenmorven*. There is a vessel abandoned. It has been said she was a derelict. There is no magic in the word derelict. It is at times used in order to try and fasten a strict rule or scale of award. In one sense the vessel was a derelict, no doubt, because she was left there, but in another sense, in the ordinary meaning of the English language, she could hardly be called a derelict. She was only disabled because she had no rudder. Otherwise she was a sound ship, and she had a tug in attendance. Whatever danger there was would be from drifting towards the land, or from being powerless at sea and having nobody on board to manage the craft at all, or from passing ships. If she had drifted more in towards the land she would have drifted into the regular traffic along the coast of Portugal and Spain, and would be a danger to other vessels, and be in danger herself.

In my judgment the contract which was made on January 2 came to an end when the vessel was abandoned. It follows that from that time what services were rendered were not rendered under the contract, but were services in the nature of salvage, and the *George V.* is entitled to be remunerated on a salvage basis for the work done in taking this ship safely into port from the place where she was left by the master and crew. I am not at all satisfied that the crew left this vessel because—certainly not solely because—of the difficulties which had been encountered in the bad weather, and through the breaking of the rope of the tug. To a great extent, if not mainly, their leaving was due to the shortness of rations and to their disinclination to go forward unless there was more food on board. What is astonishing in this case is that no steps were taken by the master, and no suggestion was made, that one tug should be sent back to Vigo, or some other port not far off, to get further provisions for the ship. However, there it is. Without sufficient justification, in my opinion, that ship was there abandoned.

1913

THE GLENMORVEN.

The President.

Before I say more about the subsequent part of the voyage, I ought to say something about the question raised as to the efficient equipment of the tug. I am going to deal with this case upon the basis of the tug itself being the one chosen by Messrs. Coupland & Co., the owners of the ship to be towed, but not upon the basis that she was so chosen if she went with any defective tackle. It was intended between the parties that the tug should be properly equipped. Therefore it is not necessary to say anything about the case of *Robertson* v. *Amazon Tug and Lighterage Co.* (1)

The conclusion at which I have arrived, after consultation with the Elder Brethren, is that the tug was properly equipped. The rope, no doubt, had been in use before. Originally it had been a very good rope, and although it had been used to a certain extent before, I have come to the conclusion in fact that the rope was a good rope for the purpose of towing this vessel. It is said that the matter speaks for itself and that the rope could not have been a good one, by reason of its snapping four times, as it did. To a great extent that was due to the severity of the weather, (as one can see by reading the log-book), and by reason of the *Glenmorven* working her own engines, which caused her to sheer. If the vessel did sheer and she was working at anything like a good speed with her engines, such sheering would put an immense strain upon the rope which connected the tug and the vessel.

An attack was made upon the master of the tug. I think it has failed, and I do not think any of the difficulties which happened from January 14 to January 22 are attributable either to mismanagement on the part of the master of the tug, or of those with him on the tug, or to any defective equipment of the tug itself.

Having said so much, I think I have disposed of the main points raised, and it only remains to allocate the sum which I think ought to be given to the owners, master, and crew of the *George V.* I give for services outside the salvage services, as a quantum meruit, (because it is not claimed under the contract,) 300*l.* For the salvage services I give the sum of 1400*l.* Out of the 1400*l.* I award to the certificated master of the tug

(1) (1881) 7 Q. B. D. 598.

1913

THE GLENMORVEN.

The President.

100*l.*, and to the certificated engineer—who, outside his ordinary duties, rendered good service in various ways—I give 50*l.* There remain the services of the pilots and two men of the pilot cutter, and of the *Dragon*. They are to be treated as salvage services, but they were not attended with very great difficulty. I give the pilots and two men a sum of 75*l.*, which they must distribute between themselves, and to the owners, master, and crew of the *Dragon* I give 75*l.* That makes a total award of 1850*l.*

Solicitors for the plaintiffs, the owners, master, and crew of the steam tug *George V.*: *Stokes & Stokes, for Bramwell, Bell & Clayton, Newcastle-on-Tyne.*

Solicitors for the plaintiffs, the pilots and the crew of the Falmouth pilot cutter: *Thomas Cooper & Co., for W. W. J. Sharpe, Falmouth.*

Solicitors for the plaintiffs, the owners, master, and crew of the steam tug *Dragon*: *Pritchard & Sons.*

Solicitors for the defendants, the owners of the *Glenmorven*: *Botterell & Roche.*

T. L. M.

THE HARBERTON.

[1912 P. 2182.]

1913
April 23, 24.

Admiralty—Ship—Collision—Steam Vessel turning—Sound Signals—Thames By-laws, 1898, *rr.* 40, 42.

A steam vessel turning round in the river, and giving the appropriate four-blast signal, under r. 40 of the Thames By-laws, 1898, is not required to give, in addition, three short blasts when, in the process of turning, her engines are going astern.

Action of Damage by Collision.

The plaintiffs were the Port of London Authority, owners of the steam *hopper No.* 11.

The defendants were William Cory & Son, Limited, owners of the steamship *Harberton.*

The case is reported on the question of the exclusive use of the appropriate sound signal to be given when a vessel is turning round in the river Thames (1), although her engines may, from time to time in the process of turning, be going astern. (2)

On October 29, 1912, about midnight—the weather being fine and clear, the wind moderate and southerly, and the tide flood of from two to three knots—the defendants' screw steamship *Harberton,* of 1443 tons gross register, with engines of 148 horse power nominal, 247 feet in length, and manned by a crew of seventeen hands, was in Woolwich Reach of the river Thames in

(1) Thames By-laws, 1898:—

Rule 40: "When a steam vessel . . . . is turning round . . . . she shall signify the same by four blasts of the steam whistle in rapid succession each blast to be of about one second's duration."

(2) Rule 39: "When two steam vessels are in sight of each other and are approaching with risk of collision the following steam signals shall be intimations of the course they intend to take

" . . . . . .

"(*c*) Three short blasts of the steam whistle each of about two seconds' duration to mean—'My engines are going full speed stern.'"

Rule 42: . . . . When vessels are in sight of one another a steam vessel under way in taking any course authorized or required by these by-laws shall indicate that course by the following signals on her whistle, viz.:—

" . . . . . .

"Three short blasts to mean 'My engines are going full speed astern.'"

1913

THE HARBERTON.

the course of a voyage from Swansea to London laden with a cargo of coal. Having arrived just below her destination, those in charge of the *Harberton* gave four short blasts on her whistle, the engines were ordered slow ahead, and the helm was put hard-aport. As the ship's head began to cant to the southward her anchor was let go, and her engines were worked ahead and astern as required, the four short blasts being again sounded. About this time the lights of a hopper coming down the river were observed. This vessel proved to be the plaintiffs' steam *hopper No.* 11, of 224 tons register, 173 feet in length, and a crew of eleven hands. She was proceeding down Woolwich Reach from Deptford to the Black Deeps with mud and shingle, and was making from seven to eight knots through the water. Those in charge of the *Harberton* again blew a four-blast signal, and as the *hopper* approached she was hailed to keep clear, the engines of the *Harberton* being put full speed ahead; but the *hopper* did not ease her engines, and attempted to pass the *Harberton*, with the result that the port bow of the *hopper* came into collision with the port quarter of the *Harberton*, doing damage, whilst the *hopper* sustained so much damage that she had to be beached.

The plaintiffs, the Port of London Authority, charged the defendants, inter alia, with breaches of rr. 39, 40, and 42 of the Thames By-laws.

Bateson, K.C., and *C. Robertson Dunlop*, for the plaintiffs, the owners of *hopper No.* 11.

Laing, K.C., and *Lewis Noad*, for the defendants, the owner of the *Harberton*.

The arguments of counsel sufficiently appear from the judgment.

1913. April 24. THE PRESIDENT (SIR SAMUEL EVANS). This is a fairly simple case, and I think it is quite clear what the decision of the Court ought to be.

The defendant vessel, the *Harberton*, was proceeding up with the tide, intending to anchor at Atlas No. 3 in the ordinary course, and in order to get to that place she turned, or began to turn round at or near the locality spoken to—the exact spot is

1913

THE HARBERTON.

The President.

not important—and performed the evolutions for that purpose which are duly recorded in the engine-room log. The master of the plaintiffs' vessel, *hopper No.* 11, curiously enough, was a man who himself had been in the collier trade, and knew perfectly well how they swing these vessels, and also knew that vessels bound to Atlas No. 3 turn round about where this vessel was. At a considerable distance away this vessel was seen by those on the *hopper*, the distance being given by them as three-quarters of a mile. It was a calm clear night, and it is in evidence, and I think substantially true, that the hull of the *Harberton*, without the lights, could be seen at a distance of half a mile. The *hopper*, notwithstanding all this, proceeded on her own side of the river, and with the full intention from the beginning, I think, of going under the stern of this vessel, she proceeded too near that vessel, took the risk of passing under the stern of the vessel, failed in the attempt, and the collision was brought about.

Comments have been made upon the conduct of the *Harberton*. I have said that in my view it is abundantly shewn by the evidence that she was proceeding to swing in the ordinary way, as every vessel is entitled to do in the river when the necessary precautions are taken. She gave several separate signals of four short blasts, which were appropriately given in the river by a vessel intending to make a turn. The first signal of four blasts was given in the open reach, without reference to the *hopper*, and, so far as I know, without reference to any particular vessel. The second signal of four blasts was given with reference partly to the *hopper*, which had been seen about that time. The third signal was given a little later—some three or four minutes later —and it is said, and I think accurately said, that nothing else could be done to indicate the manœuvres of this vessel, the *Harberton*, until it was too late to prevent the on-coming vessel from coming into collision with her. I have come to the conclusion, and am advised, that the signals which I find in fact were given by this vessel were appropriate and sufficient. Yet it is said this collision was brought about by the *Harberton* coming astern. I accept the evidence of the *Harberton*, which is corroborated by the engineer's log, which has been put in, that

1913

THE HARBERTON.

The President.

for about two minutes—more than a minute, perhaps less than two minutes—this vessel, so far from coming astern with her engines, was going with her engines full speed ahead. That she came astern now and again in the course of these evolutions is admitted. According to the record, which as I say I accept as substantially true, these evolutions for about fourteen minutes before the collision were as follows:—Full ahead 11.30, slow 11.31, stop 11.35, full astern 11.37, stop 11.39, full ahead 11.40, full astern 11.41, stop and full ahead 11.43, collision 11.45. Now, counsel for the plaintiffs, the Port of London Authority, said "When you came astern you ought to have given the appropriate signal," and they say it would have been three short blasts. Well, as counsel for the *Harberton* asked, what is the appropriate signal when the vessel is going ahead? The truth is that when a vessel is turning, after she has given four blasts, that signal supersedes for the time being all the other signals as to the orders which are given to the engines. You cannot possibly, when backing and filling, which is, I think, the phrase used in this case—when you are performing these quick manœuvres for the purpose of turning your vessel you cannot be expected, and good navigation does not require you, to give three blasts every time your engines are put full speed astern. So far as the *Harberton* is concerned I see no fault at all in her navigation or with regard to her manœuvres. With regard to the *hopper*, it is admitted, as I have said, that the *Harberton* was seen three-quarters of a mile away. Further, it is admitted that the vessel was reported a quarter of a mile away; and, at about that distance, not only was a signal of four short blasts from the *Harberton* heard on the *hopper;* but immediately afterwards the noise of the anchor chain of the *Harberton*, as the anchor was being dropped, was also heard by those on the *hopper*. They knew the vessel was dropping her anchor for the purpose of turning, or ought to have known it, when a quarter of a mile away, and I think it is fully in accordance with the evidence given here, and I am advised that beyond all question, if at that time the *hopper* had thought fit to ease up or reverse her engines this collision would have been avoided without trouble.

Some comment was made with regard to the *Harberton* not

1913

THE HARBERTON.

The President.

hearing the one-blast signal which is said to have been given twice by the *hopper;* and the fact is that none of the witnesses on the *Harberton* heard any such signal. If it be necessary to determine the question, one has to ask oneself whether the signal was given. According to the evidence of the master of the *hopper* there was a porting and keeping the helm to port, and notwithstanding that he said they only changed a point. According to the evidence of the man at the wheel this porting only achieved a change of half a point. The *hopper* was going on the south side, and I think it is very questionable whether, if she had ported half a point first and half a point the second time, this signal would have been given. Whether she was directing her course to starboard within the meaning of the rule, or merely getting a little more to the south side, I have come to the conclusion that these signals were not given. They were not heard by those who were, as I find, navigating carefully, and giving signals, nor were they heard by the man on the tug. Therefore there is no fault to find with the *Harberton.* In a word, the evidence shews that the *Harberton* was turning in the river in the ordinary course, and while so doing she was seen athwart the river, and was heard by those on the *hopper;* and notwithstanding that, the *hopper*, which could have eased or reversed her engines, did not do so, but took the risk of passing the vessel, and in taking that risk brought about the collision.

My judgment, therefore, must be that the *hopper* is alone to blame.

Solicitors for plaintiffs, the Port of London Authority: *Pritchard & Sons.*

Solicitors for defendants, the owners of the *Harberton: William A. Crump & Son.*

T. L. M.

1913
July 2, 7.

DE MONTAIGU *v.* DE MONTAIGU.

Divorce — Foreign Domicil of Husband — Separate Domicil of Wife — Jurisdiction—Decree.

The rule or theory of law that the domicil of the husband governs the jurisdiction in suits for dissolution of marriage, as distinguished from other matrimonial suits, may be departed from in proper circumstances.

Where a husband or the parents of a husband domiciled abroad has or have obtained a decree of nullity in the Court of his foreign domicil, and the wife, whose domicil was in England, is thus debarred from obtaining relief in the foreign Court, she may be treated as having a domicil of her own sufficient to give the English Court jurisdiction to entertain a suit by her for dissolution of the marriage.

The dicta of Lord Gorell in *Ogden* v. *Ogden* (*otherwise Philip*) [1908] P. 46, at pp. 82, 83, adopted.

Stathatos v. *Stathatos*, ante, p. 46, approved.

THIS was a petition by the wife for dissolution of her marriage on the ground of her husband's desertion, in not complying with an order for restitution of conjugal rights, and adultery. The case was undefended. The facts sufficiently appear in the judgment.

Bayford, for the petitioner (after stating the facts), submitted that the husband's domicil was, by choice, English; but, if his domicil was still French, he argued that, inasmuch as there had been a decree in France annulling the marriage, the case of *Stathatos* v. *Stathatos* (1) applied, and the petitioner was entitled to a decree dissolving her marriage. [He referred to *Ogden* v. *Ogden* (*otherwise Philip*). (2)]

SIR SAMUEL EVANS, PRESIDENT. If you want to rely upon *Stathatos* v. *Stathatos* (1), you must prove the French decree.

Bayford. Yes; but it will be unnecessary if I am able to satisfy the Court that the respondent's domicil is English.

[Evidence was then called and the French decree was proved.]

SIR SAMUEL EVANS, PRESIDENT. I cannot say, upon evidence

(1) Ante, p. 46. (2) [1908] P. 46.

such as this, that the respondent acquired an English domicil of choice. I will take an opportunity of looking into the cases cited upon the other point.

Cur. adv. vult.

July 7. Sir Samuel Evans, President. The question which arises in this case is whether this Court has jurisdiction upon the petition of the wife to dissolve her marriage with her husband. In her petition the wife alleged that her domicil was English. An attempt was made, upon the hearing before me, to establish by evidence a change on the part of the husband, from a domicil in France to a domicil in England. As I then said, that attempt failed. The result was that the domicil of the husband, when he entered into this marriage, was French. The husband was Count Réné de Montaigu, one of the sons of a French marquis. The story of the lady, who was an Englishwoman, was that he had asked her, on more occasions than one, to marry him when she was in Paris. She declined to do so, and the facts were that the two parties came over here to England, and went through a form of marriage at Rugby. They lived together for some time. Before very long the father of the respondent took proceedings in France to have the marriage declared null and void on the ground that the provisions of the French law regulating the matter had not been complied with. Apparently an appearance was entered in those proceedings by the husband, and also by the wife, but they took no further steps: they merely submitted to the order of the Court. The result of those proceedings, stated shortly, was that the Civil Tribunal of First Instance of the Department of the Seine, sitting in Paris, made an order in the following terms:—"For these reasons the Court declares the marriage contracted at Rugby (England) on August 3, 1909, between Réné de Montaigu and Kate Hensman was null and void, it not having complied with the provisions of Articles 63, 151, and 171, of the Civil Law; and, as it was of a clandestine character, it orders the entry of the present judgment upon the Registers of Civil Status at the last domicil in France of the two defendants and mention thereof in the margin of any entry made in France of the certificate of marriage of August 3, 1909; it

1913

DE MONTAIGU v. DE MONTAIGU.

The President.

forbids Mme. Hensman to take the name and title of Comtesse Réné de Montaigu under a penalty of 500f. damages for every proved offence."

Now the result of that is that in France this lady has no claim at all upon the man who went through a perfectly valid form of marriage with her, according to the English law. In France he is not her husband and she is not his wife; and, according to the declaration of the French Court, he never was her husband and she never was his wife, because it is not a dissolution of the marriage that has been decreed in France, but a nullity of marriage. Although that is the state of things in France, the state of things here is that because the marriage was solemnized in due form according to English law, she must be regarded as his wife here; and, according to the decisions, although she is not his wife in France and has no claim upon him, she must remain his wife here; so that if she were bold enough to enter into another marriage with an Englishman or somebody else in this country she would be guilty of bigamy.

That is an extraordinary state of things; and the difficulty that arises in dealing with these matters is that decrees of dissolution have been based in this Court upon domicil. I have said that she failed to prove that the husband acquired an English domicil; and she, according to the law upon marriage which is followed in England, acquired the domicil of the husband, which is French. There is no decision upon the point except in a case which was dealt with by Bargrave Deane J. in the course of last year. It was the case of *Stathatos* v. *Stathatos* (1), in which he adopted and acted upon the suggestion which was made in the Court of Appeal by the late Lord Gorell in the case of *Ogden* v. *Ogden* (*otherwise Philip*) (2); but at the same time he said that he hoped the case would be taken to the Court of Appeal in order that a proper judicial decision might be given upon the matter, and that meantime it would not be taken as a precedent. That being so, I thought it right, and obligatory upon me, to look into the matter myself and not merely to follow what was done in the case of *Stathatos* v. *Stathatos*. (1) The point was not decided by the Court of Appeal in the case of

(1) Ante, p. 46. (2) [1908] P. 46.

Ogden v. *Ogden* (*otherwise Philip*) (1), but Lord Gorell suggested a way out of a difficulty such as has arisen in this case. He said (2):

" With regard to the decision dismissing the appellant's suit for a divorce, it may be observed that her position after the French decree and after Philip had left her and married again would be intolerable unless some remedy in her favour existed, for by reason of the conflict of laws she would be a wife in England and not a wife in France, and in regard to such an observation it may not unreasonably be suggested that the remedy may be to allow her to obtain a divorce in England. She was not allowed to do so, because it was held that the Court had no jurisdiction in such a case, as Philip was not domiciled in England, but the real basis for not allowing a divorce suit to be maintained except in the country where the married couple are domiciled is that, in order to prevent difficulties, inconveniences, and scandals which may arise from different decisions in different countries, 'it is both just and reasonable' (in divorce cases) 'that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws'"—this latter is a quotation from the judgment of Lord Penzance in the case of *Wilson* v. *Wilson*. (3)

Then Lord Gorell continues: " This, of course, assumes the existence of a marriage the validity of which is recognized in the country where the suit is brought, and that both persons are domiciled there. Now, if the country of the husband's domicil refuse to recognize the marriage, and therefore cannot and will not entertain a suit for divorce against him, the justice and reasonableness of the international rule just mentioned cease to be apparent, and the wife having no right of suit whatever against the husband in his country, and having been left in the country of her original domicil where the marriage was celebrated and is recognized as binding upon both her and him, it would seem reasonable to permit her to sue in the latter country for the dissolution of the tie which is recognized therein, though not in

(1) [1908] P. 46.
(2) Ibid. at p. 82.
(3) (1872) L. R. 2 P. & M. 435, at p. 442.

1913

DE MONTAIGU v. DE MONTAIGU.

The President.

the foreign country, in case she has grounds of suit which would entitle her to a divorce if her husband had been domiciled in her country; in other words, to treat her as having a domicil in her own country which would be sufficient to support a suit. No general rule of law would then really be infringed. The necessities of the case would call for the intervention of the Courts of her own country in order to do her justice and release her from a tie recognized in the one country though not in the other. This way of regarding the matter does not seem to have been presented on behalf of the appellant to Lord St. Helier." This referred to the fact that Lord St. Helier had held that the Court had no jurisdiction. Lord Gorell goes on: "From the shorthand notes of the trial before him there appears to have been a very short discussion, and it seems to have been treated as if, the domicil of Philip being French, no claim for a divorce in a suit in this country was possible." Then he added that it was not necessary to come to a final conclusion on this important point, as it was not raised for decision in that case.

That suggestion of Lord Gorell has been criticized by various authors, and, amongst others, by Mr. Dicey in his book on the Conflict of Laws (1) where he says: "In *Ogden* v. *Ogden* (2) the question of divorce jurisdiction did not, in strictness, call for decision. The Court of Appeal, however, for the benefit of any woman placed, as was the appellant, in the awkward position of being held in England married to a French citizen, whilst her marriage with him was declared a nullity by French Courts, threw out the suggestion that in such circumstances the wife might probably be treated by the English Divorce Court as having a domicil in England sufficient to support proceedings for the dissolution of her marriage." Then he says that the suggestion is not in itself unreasonable; but he criticizes it upon other grounds as one likely to produce doubtful, if not bad, law.

The situation is an intolerable one for the wife, and I think it better, where necessary in a case like this, to make an exception from the ordinary rule that domicil governs these cases,

(1) (1908) 2nd ed. at p. 839, note 24 (4).
(2) [1908] P. 46.

1913

DE MONTAIGU v. DE MONTAIGU.

The President

and to grant her a decree, as a practical way of giving her the redress to which she is entitled, and without which she will be suffering great hardship. I think it better to make this exception than to adhere to the rigid rule or theory of law referred to. Holding, therefore, that I have jurisdiction in this respect, I grant the petitioner a decree of dissolution, with costs against the respondent.

Solicitors: *Tooth & Bloxam.*

H. D. G.

COWLEY *v.* COWLEY.

1913
July 17.

Divorce—Practice—Foreign Marriage—Evidence—Former Petition and Decree of Restitution of Conjugal Rights—Formal Proof of Marriage in that Suit —Subsequent Petition for Dissolution — No Fresh Proof of Marriage required.

The proof of a marriage in a suit for restitution of conjugal rights is sufficient, without further proof, in a subsequent divorce suit between the same parties, unless the validity of the marriage is put in issue.

This was an undefended suit by the wife for dissolution of marriage, founded upon the non-compliance with a decree for restitution of conjugal rights, coupled with the adultery of the respondent.

In the restitution suit the marriage at the office of the Registrar-General at Colombo, in the island of Ceylon, was formally proved, and a decree was pronounced on March 19, 1913.

This decree was served on the respondent on April 15, but was not complied with, and this constituted the statutory desertion, upon which the present petition was based, coupled with adultery committed by the respondent in the months of November and December, 1912.

Barnard, K.C., and *T. Bucknill*, for the petitioner. Formal proof of the marriage ought not to be required again in this suit.

Sir Samuel Evans, President. If formal proof of a marriage has been given and accepted in proceedings for restitution of

1913

COWLEY v. COWLEY.

The President.

conjugal rights, no further proof of the same marriage is required in subsequent proceedings for divorce between the same parties, unless, upon any ground, the validity of the marriage is put in issue. I pronounce a decree nisi, with costs, and I order that the petitioner do have the custody of the child of the marriage.

Solicitors: *Lewis & Lewis.*

H. D. G.

1913

July 7.

GULLAN *v.* GULLAN (OTHERWISE GOODWIN).

Nullity Suit—Cross-Claims for Relief—Decree—Allowance for de facto Wife—Matrimonial Causes Act, 1907 (7 *Edw.* 7, *c.* 12), *s.* 1.

The Matrimonial Causes Act, 1907, gives the Court power, in the exercise of its discretion in each particular case, to order the de facto husband to make an allowance to the de facto wife, after a decree of nullity of marriage, and, where security can be given, to order the whole or any part of such allowance to be secured.

THIS was an application, by motion, to vary the registrar's report as to variation of the marriage settlement and as to maintenance. The facts, so far as they are material, were as follows:—

The parties were married on September 17, 1902.

On March 23, 1911, a deed of separation was entered into, under which the respondent (the husband) agreed to pay to the petitioner (the wife) during their joint lives 350*l.* a year, partly secured on certain policies of insurance.

On June 21, 1911, the husband filed a petition for nullity on the ground of the wife's incapacity to consummate the marriage. The wife denied this and pleaded incapacity on the part of the husband, and on her part also asked for a decree for nullity.

On May 21, 1912, a decree nisi was pronounced "by reason of the fact that the marriage had not been consummated and that both the said parties were and are incapable of consummating the said marriage," and, the decree continued, "that application to make this decree absolute may be made by both or either of the said parties." (1)

(1) *G.* v. *G.* [1912] P. 173.

1913

GULLAN v. GULLAN.

On December 2, 1912, on the application of both the parties, the decree nisi was made absolute.

On September 15, 1902, by ante-nuptial settlement, the husband had settled three policies of insurance on his life, for 500*l.* each, and the wife's father had settled 1000*l.* debenture stock of the Mersey Docks and Harbour Board, each party at the same time also settling furniture.

The wife's income was 35*l.* under the settlement, and 5*l.* on an investment.

The husband's income was 900*l.* a year from his practice as a doctor, and 157*l.* from investments.

The registrar by his report submitted:—

"(1.) That the settlement be varied as follows:—

"(*a*) The trustees to hand back the policies on the husband's life to him freed and discharged from the trusts of the settlement.

"(*b*) The trustees to hold the wife's trust fund in trust for the wife absolutely, freed and discharged from all claims of the husband.

"(*c*) That the said furniture be divided between the parties as already agreed.

"(2.) That the respondent pay the petitioner maintenance at the rate of 100*l.* a year during their joint lives and 50*l.* a year for her life, the latter sum to be secured by a charge upon the stocks and shares standing in his name.

"Both allowances to cease on her remarriage or death."

Barnard, K.C., and *W. O. Willis*, for the respondent (husband), moved to vary the second clause of the recommendations in the registrar's report. It is doubtful whether the Legislature contemplated all classes of cases of nullity, and it is probable that only such suits as were included in s. 4 of the Matrimonial Causes Act, 1859, were really intended to be dealt with. But the words of the Act of 1907 are so general, that it is not open to the respondent to contend that this case does not come within that Act. The Court, however, ought not to deal with questions of allowance after decrees of nullity in the same way as after divorce. It is left entirely to the discretion of the Court to say

1913

GULLAN v. GULLAN.

what is reasonable under the circumstances of each particular case. The respondent has married again. He may fall ill and lose the income derived from his practice. It is a great hardship on him, that he should be ordered to secure any part of the allowance to be made to the lady whom the Court has declared not to have been married to him, especially as, it is submitted, the Court has no power to order hereafter a diminution of any amount which has been ordered to be secured. Apart from this, the present case cannot be dealt with like any case which has preceded it. In view of the finding of the Court and the novel form of the order made upon the pronouncing of the decree and forming part of it, some blame must attach to the petitioner, even if, similarly, some blame attaches to the respondent.

It is submitted that the 50*l.* which the registrar has recommended to be paid and secured should be omitted altogether. The petitioner's father is well off and in all probability the petitioner will inherit a substantial sum of money on his death. Although this expectation cannot be assessed in fixing the amount of allowance, it is an element that may fairly be borne in mind, in considering all the circumstances of the case.

There has been only one reported case since the Act of 1907 was passed: *Sharpe* (*otherwise Morgan*) v. *Sharpe*. (1) In that case the wife had filed her petition and got her decree.

Bayford, for the petitioner. The amount suggested by the registrar should be increased. Security ought to be given for part of the allowance. The respondent might sell his practice and go abroad, and the petitioner might be left to seek payment in the best way she could, in any part of the world that the respondent might go to. This is eminently a case in which some part of the allowance should be secured. It is a case of misfortune rather than blame; and, whichever way it is looked at, either party is in the same position. The report deals with the matter as if the wife were the successful party in the suit; and, on the basis of one-third, she would be entitled to 325*l.* a year, part of which would be secured, as contemplated by the last words of sub-s. 2 of the first section of the Matrimonial Causes Act, 1907.

(1) [1909] P. 20.

This marriage lasted for ten years. The husband, who is a medical man, agreed, by the deed of separation, to allow the wife 350*l.* a year. That payment, by the decree, is avoided; and he is to get back the settled policies, the premiums on which he need not in future keep up, unless he wishes to do so. A fair allowance, under all the circumstances, would be 150*l.*, to be paid during the joint lives, and 50*l.* in addition, to be secured and paid to the petitioner during her life.

Barnard, K.C., in reply. The case is not arguable on the basis of one-third. There is no reported case which has put on the same footing as divorce the assessment of allowance in a case of nullity, where the petitioner, by the decree of the Court, is declared never to have been the wife of the respondent.

SIR SAMUEL EVANS, PRESIDENT. The submission of the registrar as to the amount is not very clear. For the petitioner, the view put forward is that it means 150*l.* a year during the joint lives and 50*l.* a year for her life; and counsel for the respondent very candidly admits that it never struck him that it was open to any other construction. But I am of opinion that if 100*l.* a year is paid during the joint lives, this will be enough; the 50*l.* a year for her life if she survives is to be secured as submitted by the registrar.

Subject to these modifications, I confirm the report.

Solicitors for petitioner : *Burton, Yeates & Hart.*

Solicitors for respondent: *Lewis & Lewis.*

H. D. G.

1913
June 23 ;
July 8.

BOURNE *v.* BOURNE.

Divorce—Separation Deed.

A separation deed whereby husband and wife agree not to institute proceedings in respect of past matrimonial offences, and containing an express condonation of such offences, being valid, the clauses in such deed must be interpreted according to the ordinary rules of construction.

A husband and wife entered into a deed of separation, whereby (inter alia) they expressly and mutually agreed that any matrimonial offences which might have been committed by either of them before the execution of the deed were thereby condoned ; but, by a subsequent clause, it was agreed (inter alia) that if the marriage should be dissolved or if the parties should be judicially separated by reason of any misconduct occurring after the date of the deed, then all the covenants and provisions contained in the deed should become void.

The husband had been guilty of cruelty and adultery before the date of the deed, and it was proved that he had been guilty of adultery after the date of the deed :—

Held, that although it was doubtful whether the subsequent adultery revived, either by virtue of or apart from the deed, the offences which by the deed had been expressly condoned, yet, inasmuch as the subsequent adultery of the husband would entitle the wife to a judicial separation, and, thereupon, the covenants in the deed, including the condonation clause, would become void, and she might then in a subsequent proceeding obtain a dissolution of marriage, the Court would not put her to such a circuitous mode of obtaining relief as would thereby be involved, but would at once grant a decree nisi dissolving the marriage.

Dowling v. *Dowling* [1898] P. 228, doubted but followed.

This was a wife's petition for dissolution of marriage on the ground of adultery and cruelty. The facts are fully stated in the judgment.

Le Bas, for the petitioner. Clause 3 of the deed of separation referred to proceedings in respect of cruelty and adultery committed before the deed, but clause 10 meant that adultery committed subsequently to the deed would revive cruelty committed prior to the deed, and which was said to have been condoned by the deed. [He referred to *Gooch* v. *Gooch* (1), *Dowling* v. *Dowling* (2), and *Rose* v. *Rose*. (3)]

Cur. adv. vult.

(1) [1893] P. 99. (2) [1898] P. 228.
(3) (1882) 7 P. D. 225.

1913

BOURNE v. BOURNE.

July 8. SIR SAMUEL EVANS, PRESIDENT. The husband and wife in this case entered into a separation deed on January 19, 1909, by which they agreed to live apart on certain terms. By clause 3 of the deed they mutually and expressly covenanted that any matrimonial offences which might have been committed by either before the execution of the deed were thereby condoned. By clause 10 it was agreed (inter alia) that if the marriage should be dissolved, or if the parties should be judicially separated by reason of any misconduct of the husband occurring after the date of the deed, then all the covenants and provisions therein contained should become void.

It has been established by decisions in this Court that an agreement not to take proceedings, and a condonation of offences by such a deed, is valid: *Rose* v. *Rose*. (1) The clauses of the deed must, therefore, be construed according to the ordinary canons. Clause 10 seems to have been adopted as a more or less ordinary form. By its terms the covenants and provisions of the deed only become void "if the marriage shall be dissolved or they shall be judicially separated by reason of the misconduct of the husband occurring after the date hereof." The clause is not drafted happily or efficiently to carry out the probable intention of the parties; dissolution of the marriage or a judicial separation must take place before the condonation covenant becomes void. It was proved that the respondent had been guilty of cruelty and adultery before the date of the deed, and that he had also committed adultery after its date. The petitioner's counsel contended that the subsequent matrimonial offence revived, either under, or apart from, the deed, the anterior offences which had been expressly condoned. I am of opinion that this contention is not sound. Upon the facts of this case, the petitioner might no doubt obtain a judicial separation on the ground of the adultery committed after the deed. Thereupon the covenants in the deed, including the condonation covenant, would become void. She might then, in other proceedings, obtain a decree of dissolution on the ground of the previous cruelty and the adultery. This would be a circuitous way of obtaining redress. I find that in one case, *Dowling* v. *Dowling* (2),

(1) 7 P. D. 225; 8 P. D. 98. (2) [1898] P. 228.

1913

BOURNE v. BOURNE.

The President.

where the provision was in almost identical terms with clause 10 above referred to, Gorell Barnes J. granted the wife a decree on the sole ground that the deed of separation had not been pleaded by the husband. I do not feel that that decision proceeded, or was based, on grounds wholly satisfactory. But I can follow it, and am content in this case to do so.

I therefore grant the petitioner a decree nisi for dissolution, with costs, and I give her the custody of the three children of the marriage.

Solicitors: *Godden, Holme & Ward.*

H. D. G.

1913

May 7, 8.

THE TEMPUS.

(1913 B. 984.)

Admiralty—Ship—Collision—Sound Signals for Vessels in sight of one another—"Directing my course"—Regulations for Preventing Collisions at Sea, art. 28.

A steam vessel bound, under the regulations for preventing collisions at sea, to keep her course and speed, found herself so close to a steam vessel bound to give way, that a collision could not be avoided by the action of the other vessel alone. She, therefore, by reversing her engines and hard-a-porting, endeavoured to avoid the other vessel; but did not indicate her manœuvres by the appropriate sound signals required by art. 28:—

Held by the President (Sir Samuel Evans), that the omission to give the sound signals neither caused the collision, nor contributed to the casualty, and did not, in the circumstances, amount to a breach of the rule, as the words "I am directing my course to starboard" were not applicable to an attempt, at the last moment, to escape a collision.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the owners of cargo lately laden on board the *Breiz Huel.*

The defendants were the owners of the *Tempus.*

The case is reported on the question, in respect of sound signals, of the meaning to be attached to the words "I am directing my

course" in art. 28 of the regulations for preventing collisions at sea. (1)

1913

THE TEMPUS.

On March 9, 1913, about midnight,—the weather being fine and clear, the wind moderate, westerly, and the tide about slack —the French steamship *Breiz Huel*, of 4845 tons gross register, 390 feet long, with triple expansion engines of 312 horse power nominal, and manned by a crew of thirty-nine hands all told, was in the Bristol Channel, between Hartland Point and Trevose Head, on a voyage from Barry to Algiers with a cargo of coal the property of the plaintiffs. She was making about ten knots on a course of S.W. ¼ W. magnetic, when those in charge observed about two miles distant, and about a point on the starboard bow, the masthead lights and then the red light of a vessel, which proved to be the *Tempus*, a steamship belonging to Cardiff, of 2980 tons gross register, 325 feet in length, with engines of 286 horse power nominal, manned by a crew of twenty-five hands all told, and bound from Barcelona to Cardiff in water ballast. She was steering N.E. by E. ½ E. magnetic and making about ten knots. According to those in charge of the *Tempus* the masthead lights of the *Breiz Huel* had been observed some seven miles distant bearing slightly on the port bow, and, after a time, the green light of the French vessel came into view on the port bow of the *Tempus*. In the position the vessels then were it was the duty of the *Breiz Huel* to keep clear, and the duty of the *Tempus* to keep her course and speed. The subsequent movements of the helm and engines of the two vessels fully appear from the judgment. In the result the vessels came into collision with such force that the *Breiz Huel* foundered and the plaintiffs' cargo was lost.

Bateson, K.C., and *A. Bucknill*, for the plaintiffs.

Aspinall, K.C., and *D. Stephens*, for the defendants.

(1) Art. 28: ". . . .

"When vessels are in sight of one another, a steam vessel under way, in taking any course authorised or required by these rules, shall indicate that course by the following signals on her whistle, or siren, viz.:—

"One short blast to mean, 'I am directing my course to starboard.'

"Two short blasts to mean, 'I am directing my course to port.'

"Three short blasts to mean, 'My engines are going full speed astern.'"

1913

THE TEMPUS.

1913. May 8. THE PRESIDENT (SIR SAMUEL EVANS). The plaintiffs in this action are the owners of a cargo which was carried in the vessel *Breiz Huel*, which vessel was sunk in a collision with the defendants' vessel, the *Tempus*, and thereby the cargo of the plaintiffs became totally lost.

The question whether the plaintiffs can recover depends upon the question whether the defendants' vessel was either wholly or partially to blame for the collision. It is admitted that these steam vessels were on crossing courses when they first sighted each other. The course of the *Breiz Huel* is pleaded and accepted, I think, for this purpose, as S.W. $\frac{1}{4}$ W. magnetic, and the course of the *Tempus* as N.E. by E. $\frac{1}{2}$ E. magnetic, constituting a difference of about $1\frac{1}{2}$ points. The speeds were approximately the same. They are pleaded exactly the same. In evidence it was said that the *Tempus* had a speed of about nine, and not quite ten knots as pleaded. It is admitted that the speed of the *Breiz Huel* was ten knots. The facts shew that there was risk of collision. The *Breiz Huel* was a vessel which had the *Tempus* on her own starboard side, and the obligation therefore rested on the *Breiz Huel* to keep out of the way of the *Tempus*. The respective duties of the two vessels, therefore, were, first of all, of the *Breiz Huel* to keep out of the way of the *Tempus*, and, secondly, of the *Tempus* to keep her course and speed. As a corollary, under art. 22 the *Breiz Huel* should in the circumstances of the case have avoided crossing ahead of the *Tempus*. Further, under art. 23, the *Breiz Huel* should, on approaching the *Tempus*, if necessary, have slackened her speed or stopped or reversed.

On the other hand, the *Tempus*, whose primary duty it was to keep her course and speed, was bound to act in accordance with arts. 21, 27, 28, and 29, and with the requirements of good navigation. Now, counsel for the plaintiffs argued that the *Breiz Huel* was rightly navigated, and that the *Tempus*, the defendant vessel, defeated the operations of the *Breiz Huel* by porting early and continuing to port, and by, at the last, hard-a-porting. In the pleadings the case made for the *Breiz Huel* in justification for trying to pass ahead of the *Tempus*, out of whose way she ought to keep, is that "those in charge of the *Breiz*

1913

THE TEMPUS.

The President.

Huel were unable to alter their course to starboard on account of a sailing vessel which was shewing her green light a little on the starboard bow of the *Breiz Huel*, and as the course of the *Breiz Huel* had been altered to port to pass astern of the sailing vessel almost immediately before the lights of the *Tempus* were sighted, those in charge of the *Breiz Huel* again altered their course about 1½ points to port, as there was plenty of time and room for the *Breiz Huel* to pass ahead well clear of the *Tempus*, provided the *Tempus* kept her course and speed."

The case the *Breiz Huel* set out to make, therefore, was, "I was driven to try to pass ahead of the *Tempus* by reason of difficulties and the embarrassment created by the presence of the sailing vessel." When, however, the evidence came to be given, it was abundantly clear from the evidence of the plaintiffs themselves that there was no difficulty and no embarrassment created by the presence of the sailing vessel at all, which involved the *Breiz Huel* in the course which she took. She, therefore, omitted to avoid crossing ahead of the defendant vessel. That was wrong. She was wrong in almost everything she did. She gave no signal of the alteration of course, which she said she made, to the sailing vessel, but that, of course, does not involve her in liability in this particular action, but it shews the kind of navigation which she was indulging in; and it is admitted that from first to last she gave no indication of anything she was doing to the vessel out of whose way she ought to keep, and which, up to almost the very last, was under an obligation to keep her course and speed.

The vessels were approaching upon these crossing courses for some considerable time. Evidence was given from the *Breiz Huel* of various courses which it is said that vessel made after 12 o'clock. The courses remain in considerable doubt. I am not at all satisfied that the account given is correct, and it is impossible to say, on the evidence, where it was that one course was dropped, and another course began. The minute calculations made by counsel for the plaintiffs involve great difficulties and are subject to great uncertainties. They depend not only on speed but accuracy of observation, accuracy of recollection, &c., and I cannot in this case act upon them. I must act upon the

1913

THE TEMPUS.

The President.

evidence, which I believe is accurate evidence, given by the officer in charge of the *Tempus*. The collision took place a little after the watch began at midnight. The second officer was in charge on the *Breiz Huel*, and the chief officer was in charge of the *Tempus*. The chief officer of the *Tempus* said he was watching the *Breiz Huel*, having observed her lights some considerable distance away, and was not merely watching her with the naked eye, but was picking up her lights with his glasses; and he was watching closely, expecting her to port and show her red; and he did that until he approached the vessel to within a distance of about a quarter of a mile.

I accept that story. I am satisfied that is a true story. At a quarter of a mile, according to the chief officer of the *Tempus*, the other vessel bore about $1\frac{1}{2}$ points, and there was risk of collision. The *Breiz Huel* hard-a-starboarded about that distance away. One side puts the distance at about a quarter of a mile, and the other at about 200 or 300 mètres. The hard-a-starboarding on the *Breiz Huel* was done without any warning to the other vessel at all, and it was done, according to the *Breiz Huel*, in order to try to ease the blow of the collision, which was then inevitable. If, at a quarter of a mile or thereabouts, this vessel, instead of hard-a-starboarding, had ported—especially if at about this distance also the *Tempus* ported, as she in fact did—the collision would no doubt have been avoided. I have no doubt, and am so advised, that even if the *Breiz Huel* at this stage had stopped and reversed her engines the collision would have been avoided, because another half length would have made all the difference. She did neither one thing nor the other, and, as I have said, from beginning to end her navigation was faulty and blameworthy.

Then comes the question whether at the last the *Tempus* ought to have done something which she did not do, or ought to have omitted to do something which she did do. A quarter of a mile sounds a considerable distance, but when we remember the speeds of these vessels, and picture them approaching each other, they were at pretty close quarters. Apart from any lengthening of the distance by reason of the swinging, as the vessels were approaching at these speeds, that quarter of a mile

means that one vessel and the other had roughly two of their own lengths to travel, and they would cover the distance in something like forty seconds.

It has been pointed out over and over again that the Court ought to be careful not to cast blame too readily upon a vessel which is placed in difficulty by another vessel. In the first place, the *Breiz Huel* gave no indication at all to the *Tempus* of what she was going to do, up to the very last. Therefore the *Tempus* was left in doubt as to whether at the very last something would be done by the *Breiz Huel* to avoid collision. I have said that if the *Breiz Huel* had reversed her engines, about a minute or less before the collision, the collision would have been avoided, and I do not think I ought to cast blame upon the *Tempus* if she expected, as no doubt she did, that up to that stage something would be done by the other vessel to carry out the obligations placed upon her. The *Tempus* in fact, almost immediately afterwards, did take action. She ported her helm to try to avoid the collision. She then, almost as one order, put her engines full speed astern and hard-a-ported. If she had reversed a little earlier than she did, I think it is very doubtful whether the collision would have been avoided. It is said she did not signal when she ported, or when she hard-a-ported, or when she put her engines astern. I have blamed the other vessel for not signalling, and it may be said that I ought to blame the *Tempus* also for not signalling; but the circumstances are very different. The *Breiz Huel* was deliberately directing her course to port, and ought to have given the starboard helm signal. In one sense the *Tempus*, when she ported and hard-a-ported, was directing her course to starboard. In another sense she was hardly directing her course at all, but was, in an emergency, trying to run away from the vessel which had placed her in difficulty. I do not say she would be excused from sounding a signal if sounding that signal would make it easier for the other vessel to do something to avoid collision, but I think I ought not to be so strict in regard to the omission to signal on the part of the *Tempus* in such an emergency as I should be if she had been directing her course in the ordinary way for the purpose of navigation. Moreover,

1913

THE TEMPUS.

The President.

I think that, even if the signal had been given by the *Tempus* when she ported and hard-a-ported in the agony of the collision, it would not have had any effect upon the collision—that the want of that signal did not cause the collision, nor contribute to the casualty. This question has given me some trouble because I am anxious that, if possible, vessels should observe these salutary rules. The question which I have to determine, namely, whether the defendant vessel did something, at the last moment, which she ought not to have done, or omitted to do something which she ought to have done, is mainly a nautical question, and the Elder Brethren advise me that under art. 21 the *Tempus* could not be expected to take action earlier than she did, that she did not act too late, and that in the agony she did not act improperly. I have applied my mind independently to this question, and after consideration I am happy to say that my view coincides with the advice which I have received. For the reasons I have given, I think the collision was wholly due to the faulty navigation of the vessel, the *Breiz Huel*, in which the plaintiffs' cargo was being carried, and therefore judgment must be entered for the defendants, the owners of the *Tempus*.

Solicitors for plaintiffs: *Stokes & Stokes.*

Solicitors for defendants: *Botterell & Roche, for Vaughan & Roche, Cardiff.*

T. L. M.

[IN THE COURT OF APPEAL.]

C. A.
1913
July 28, 29.

THE OKEHAMPTON.

[1912 M. 347.]

Admiralty—Ship—Collision—Damage—Time Charter—Sub-charter—Bailee—Claim for Bill of Lading Freight.

The plaintiffs, sub-charterers of a steam vessel which sank with her cargo after collision with the defendants' vessel, sued the defendants for the bill of lading freight which (but for the negligence of those in charge of the defendants' vessel) they would have earned if the voyage of the chartered vessel had been completed. Bargrave Deane J. disallowed the claim ([1913] P. 54) on the ground that the charterers only used the vessel for the temporary purpose of a defined voyage, and that this voyage was conducted by the master and crew as the servants of the owners with whom the possession of the ship remained. The shipowners were, therefore, the carriers of the cargo :—

Held by the Court of Appeal (Vaughan Williams L.J., Buckley L.J., and Hamilton L.J.), reversing the decision of the Court below, that the plaintiffs had a sufficient possessory interest in ship and cargo to entitle them, as bailees, to maintain the action, the evidence, taken by the registrar under an order of the Court of Appeal, shewing that the contract of carriage was between the plaintiffs and the shippers of the cargo, the plaintiffs taking delivery of the goods from the shippers, putting them on board, and signing the bills of lading in their own name, and on their own behalf, as principals.

Appeal by plaintiffs, Robert MacAndrew & Co., sub-charterers of the steamship *Ruggiero di Flores*, against a decision of Bargrave Deane J., disallowing, in favour of the respondents (defendants), owners of the steamship *Okehampton*, the plaintiffs' claim for loss of bill of lading freight.

On January 12, 1912, a collision occurred in the North Sea between the *Ruggiero di Flores* and the *Okehampton* in consequence of which the *Ruggiero di Flores* sank. She was an Italian vessel, and at the material time was on a voyage from Valencia to Hamburg with a cargo consisting mainly of fruit and wine. She was under charter to C. A. Blom & Co., of Newcastle-on-Tyne, by whom she was sub-chartered to the plaintiffs, Robert MacAndrew & Co. of London. The sub-charter is set out in the report of the case in the Court below. (1)

(1) [1913] P. 54, at pp. 56 to 62.

C. A. 1913

THE OKEHAMPTON.

In consolidated actions brought by the owners of cargo and others against the defendants, the owners of the steamship *Okehampton*, of Cardiff, the defendants admitted that the collision was caused by the negligent navigation of the *Okehampton*, and agreed to a reference to the registrar and merchants on the basis of paying 65 per cent. of the proved damages recoverable at law.

The particulars of the appellants' (plaintiffs') claim were as follows: —

Item No. 1, 1202*l.* 19*s.* 2*d.* made up of—bill of lading freight payable at Hamburg 1506*l.* 19*s.* 1*d.* less (*a*) hire of the vessel from the date of the collision to the estimated date of the termination of the voyage to Hamburg, 80*l.*; (*b*) expenses which would have been incurred at Hamburg had the voyage been completed, 223*l.* 19*s.* 11*d.*

Item No. 2, 61*l.* 19*s.* for fifty-nine tons bunker coal which would have been on board after completion of discharge at Hamburg.

The learned registrar allowed item No. 2, but disallowed item No. 1 on the ground that the claim was too remote.

On appeal (by way of motion in objection to the registrar's report) in respect of item No. 1, Bargrave Deane J. held (1) that this item was properly disallowed, as, by the identical terms (except as to date) of the charter and sub-charter, though the appellants (plaintiffs), the sub-charterers, had the use of the vessel for the voyage, the shipowners remained in possession by their servants the master and crew, and, therefore, the appellants, the sub-charterers, had no right of action against the respondents (defendants), who had paid the shipowners for loss of chartered freight, and, as the shipowners had carried the goods for the sub-charterers, they (the owners of the *Ruggiero di Flores*) alone were in a position to sue for the freight claimed by the sub-charterers.

On April 22 and 23, 1913, the case came before the Court of Appeal (consisting of Vaughan Williams L.J., Hamilton L.J., and Bray J.), when it was argued on behalf of the appellants (plaintiffs) that the contract of carriage was between the appellants and the

(1) The judgment is set out in full in the report in the Court below: [1913] P. 54, at pp. 66 to 69.

owners of the goods, and, therefore, the appellants had a possessory interest which entitled them to sue; whilst, on behalf of the respondents (defendants), the terms of the sub-charter and the sample of the bill of lading (produced by the plaintiffs) were relied on as shewing that there was no demise of the ship, and that the contract of carriage was between shipper and shipowner, the sample bill of lading in Spanish having the words "el capitan" to indicate where the master of the vessel was to sign, presumably on behalf of his owners, in accordance with clause 13 of the sub-charter, and, if the representatives of the charterers in fact signed, it was on behalf of the master. In the result the further hearing of the appeal was adjourned, and it was ordered that "the registrar do meanwhile take evidence and report upon the terms and signatures of the actual bills of lading for the cargo lost, and also upon the circumstances tending to shew who were the actual parties to the contracts for the carriage of the goods in question, attaching to his report any original bills of lading proved before him. Costs reserved."

On May 3 the registrar reported that, on May 1, the plaintiffs had produced four witnesses for examination, namely, the manager for Robert MacAndrew & Co. at Carthagena (who signed the bills of lading at that port of loading), the manager at Valencia (who signed the bills of lading there), a clerk to Robert McAndrew's agents at Hamburg, and a member of the plaintiff firm of Robert MacAndrew & Co., of London, and the report continued: "The cargo of fruit was shipped at Valencia and Carthagena. The proceedings in regard to the cargo at each port were the same. At Carthagena, where the bulk of the cargo was shipped, the fruit arrived by rail; it was taken delivery of by MacAndrew's men on presentation to the railway company of forwarding notes received from the shippers which were kept by the railway company. MacAndrew's men took the fruit to the quay and then to the ship's side. It was then loaded by the stevedore's men. MacAndrews paid all the expenses incurred from the receipt of the fruit till it was placed in the ship's hold. The mate's receipts for the fruit were handed to MacAndrew's manager, and, on the following day, the bills of lading were made out in triplicate. Two were signed by MacAndrew's

C. A. 1913

THE OKEHAMPTON.

representative and given to the shipper, and the third was sent to MacAndrew's agents at Hamburg. The captain had no document showing the names of consignees or the amounts payable. The manager gave the captain orders to go to Hamburg. If the ship had arrived at Hamburg, MacAndrew's agent there would have taken delivery of the fruit, and it would have been deposited in sheds in their names and delivered by them to the consignees on presentation of the bill of lading. If the consignees were not known to the agents they would have required payment of the freight before delivery of the fruit. Other matters were touched on by the witnesses ; but the above statement embodies what appear to be the material facts."

Appended to the report were the bills of lading of the cargo (except five which had been lost by the consignees) and the mate's receipts.

On July 28 and 29, 1913, the case came before the Court of Appeal (consisting of Vaughan Williams L.J., Buckley L.J., and Hamilton L.J.) for further hearing, and was treated by the Court as a rehearing.

Batten, K.C., and *C. Robertson Dunlop*, for the appellants (plaintiffs). It is submitted that, though the owners of the *Ruggiero di Flores* had not parted with the possession of the vessel in the sense of her control for purposes of navigation by their master and crew, the appellants, in their capacity of sub-charterers, had, as bailees, sufficient possessory interest in the vessel and her cargo to entitle them to bring and maintain the action against the owners of the wrong-doing vessel, the *Okehampton*, in respect of the loss of the bill of lading freight payable at Hamburg, less the hire of the vessel, and the expenses which would have been incurred at Hamburg.

The evidence taken, by order of this Court, before the registrar shews the course of business, and establishes the proposition contended for by the appellants, namely, that the contract of carriage was not with the shipowner, but was between the shippers and the appellants, for the representatives of the appellants at the ports of loading, Valencia and Carthagena, took delivery of the goods from the shippers, put the goods

on board, kept the mate's receipts, signed the bills of lading on behalf of their principals, the appellants, directed the master of the vessel to proceed to Hamburg, and, if the vessel had arrived there, the goods would have been warehoused by the agents of the appellants, and by them delivered to the consignees on presentation of the bills of lading.

In addition to the cases and text-books cited in the Court below (1), and in the judgment of Hamilton L.J., the following were referred to: *Kruger & Co.* v. *Moel Tryvan Ship Co.* (2); *Herman* v. *Royal Exchange Shipping Co.* (3); *Harrison* v. *Huddersfield Steamship Co.* (4); *Reeves* v. *Capper* (5); Pollock and Wright on Possession in the Common Law (1888), p. 166, s. iv.; Carver's Carriage by Sea, 6th ed., s. 154.

Roche, K.C., and *Lewis Noad*, for the respondents (defendants), the owners of the *Okehampton*. The evidence directed by this Court to be taken by the registrar has not affected the position, that is, the legal position, of the parties, for the fact remains that there was no demise of the ship by the owners of the *Ruggiero di Flores*, so that the possession and control of their vessel remained with them, and, therefore, the goods, at the time of the collision, were in the custody of the master of that vessel on behalf of his owners, who had, under clause 25 of the sub-charter, a lien upon them for unpaid hire (6), and the bills of lading were signed, in accordance with their legal obligation, by members of the different firms of MacAndrews, at the different ports, on behalf of the master as the agent of the shipowner, the result being that the shipowner could sue for the freight and distribute it amongst the parties entitled, but the appellants (plaintiffs) had no possession and no right of action.

In addition to the cases and text-books cited in the Court below (7), the following were referred to: *Turner* v. *Hagi Goolam Mahomed Azam* (8); *Lord* v. *Price* (9); *Gordon* v. *Harper* (10);

(1) [1913] P. at pp. 65, 66.
(2) [1907] A. C. 272.
(3) (1884) 1 Cab. & E. 413.
(4) (1903) 19 Times L. R. 386.
(5) (1838) 5 Bing. N. C. 136.
(6) The argument on behalf of the respondents on this point is fully stated in the judgment of Hamilton L.J.
(7) [1913] P. 54, at p. 66.
(8) [1904] A. C. 826.
(9) (1874) L. R. 9 Ex. 54.
(10) (1796) 7 T. R. 9.

C. A. 1913

THE OKEHAMPTON.

Harrowing Steamship Co. v. *William Thomas & Sons* (1); *Tagart Beaton & Co.* v. *James Fisher & Sons* (2); Carver's Carriage by Sea, 5th ed., s. 166; Clerk and Lindsell on Torts, 6th ed. (1912), p. 282; Pollock and Maitland on the History of English Law (1895), vol. ii., p. 168 (Bailment).

VAUGHAN WILLIAMS L.J. In this case the only bills of lading, which were signed, were signed by MacAndrews. I at once say that as far as there was a suggestion that there were two firms of MacAndrew I have already in the course of the argument stated that we thought on the evidence we had no right to come to that conclusion. It is one firm with two branches.

The question is whether Robert MacAndrew & Co., the plaintiffs, had such an interest here—such a possessory interest—as to enable them to become plaintiffs. We have heard, in the course of this morning, from counsel for the appellants, an account of what the actual arrangement between the shipper and MacAndrew was. I see no reason for saying, my attention having been called to the evidence, that there is not ample evidence that that was the arrangement.

Now, we have to consider what is the meaning of the signature to the bill of lading here; does it mean that MacAndrew was acting as the agent of the shipowner when he signed the bill of lading, or does it mean that, when he signed, he signed it on his own behalf? I think it means he was signing it on his own behalf. I think, further, it means he signed it on his own behalf with the full knowledge of the master. Of course, no one would deny that a bill of lading which is signed by the charterer of a ship may be a bill of lading which is signed on behalf of the master. It may be, notwithstanding the fact that it is signed in the charterer's name. In this case we have it in evidence that the goods were received by the mate of the ship, and that he gave a receipt, and prima facie it would have to be assumed, in the absence of circumstances, some of which I have already detailed, that thereupon the master would be regarded as the bailee of this cargo. The master, of course, generally is the servant of the shipowner where there is a charter, and represents the shipowner.

(1) (1913) 29 Times L. R. 365. (2) [1903] 1 K. B. 391.

Under these circumstances we have to look and see what the facts are. I take it that on the evidence it is beyond dispute, now, that the master knew perfectly well that MacAndrew was signing these bills of lading. Whether or not he knew the exact circumstances as between the shippers and the charterer I do not know. That refers to relations and circumstances of which I have just spoken. But, however that may be, in my opinion the master knew perfectly well about this bill of lading. When one comes to the conclusion in fact that this bill of lading or these bills of lading were signed really by the charterer, not in any sense as agent, still less as servant, of the ship, it seems to me we should be doing very wrong if we were to say in such a case that the signing of the bill of lading by MacAndrew was a signing on behalf of, or as agent of, the master of the ship. Under those circumstances I do not know that I have to deal with the matter at any greater length.

In my opinion the moment you come to the conclusion that the bill of lading was signed by MacAndrew, the charterer, not on account of the ship but on his own account, it follows necessarily that he had sufficient interest—really sufficient possession—to enable him to bring this action. The real objection here is that he had no such interest as to enable him to bring the action, but in my opinion he had.

Buckley L.J. I agree that this appeal must succeed. I think it unnecessary to take time in delivering any independent judgment of my own.

Hamilton L.J. I agree. The case is entirely transformed now that the facts with regard to the shipment of the goods and the signing of the bills of lading have been exactly ascertained.

It now appears that the plaintiffs' claim is not merely for the loss of contractual advantages which have been defeated by the collision; it is a claim for damage suffered by the loss of cargo bailed to them in regard to which they had such rights of possession as entitled them to bring this action. I agree that the plaintiffs, Robert MacAndrew and Co., so named on the writ, are upon this evidence identical with the firm of

C. A. 1913

THE OKEHAMPTON.

Hamilton L.J.

MacAndrew & Co., at Carthagena and Valencia, who signed the bills of lading. It is so stated in terms by one of the witnesses, and I do not think that the document entered into in compliance with Spanish law on establishing the firm at Barcelona is sufficient to answer that evidence. The goods were received from the growers by the firm of MacAndrew & Co. at both those ports. Full evidence is given as to the course pursued as to loading at Carthagena. The registrar's report states that the same course was pursued in substance at Valencia. This must have been taken on admission, and there is nothing in the evidence to cast any doubt upon it. The goods were in the hands of MacAndrew & Co. until the vessel arrived, and were placed on board by their stevedores.

The *Ruggiero di Flores* was a casual addition to a line of steamers consisting partly of steamers owned by Robert MacAndrew & Co., partly of steamers owned by the Compañia Marítima of Barcelona, in which Robert MacAndrew & Co. owned 95 per cent. of the stock. The cargo was sent down by the growers pursuant to current shipping arrangements made for the season with MacAndrew & Co. The bills of lading—and it was really for the purpose of getting the original bills of lading and of clearing up the circumstances under which they were signed that the adjournment took place—express contracts of carriage to which MacAndrew & Co. are parties and the owners of the *Ruggiero di Flores* are not. The latter is the important point. Whether MacAndrew & Co. were agents for the Compañia Marítima, signing in such a form as to be personally liable, though in fact only agents, or were signing entirely for themselves matters little, although, having regard to the number of ships which Robert MacAndrew & Co. themselves owned, the evidence warrants the conclusion which I draw, that they were signing for themselves as principals. The shipowners at any rate are not parties to these contracts of carriage. The difficulties suggested in construing the bill of lading appear illusory. In a form of bill of lading used for the whole line, terms like ship, vessel, shipowner, owner, are used, which in the case of a chartered vessel must be adapted to that case, as if they spoke of the ship as "chartered" ship and so on. I think it is not

C. A. 1913

THE OKEHAMPTON.

Hamilton L.J.

unimportant to recollect that the ship is an Italian ship, that she is loading in Spanish ports, and that she is loading from a firm which carries on a well-known business in those Spanish ports —circumstances which enhance the probability that the carrying contractor would be the well-known firm and not the unknown owners of a foreign steamer. No doubt it is true that the business of signing bills of lading ashore, when the vessel is loaded, is often carried out rapidly and without much formality, and it is sometimes difficult to tell on whose behalf a person signs the bill of lading, unless he is the master himself; but, as was pointed out by Walton J. in *Samuel* v. *West Hartlepool Steam Navigation Co.* (1), the matter must be determined on the documents and circumstances of each case. For that reason one may put aside *Wehner* v. *Dene Steam Shipping Co.* (2), because, although the course of business described there is very well known, in that case the bill of lading was actually signed by the master of the vessel, but such was not the case here.

The contract for the carriage and delivery of the goods at Hamburg being made with MacAndrew & Co. in form, why is it to be said that in fact it was not so? The argument is that there was an obligation upon Messrs. MacAndrew & Co. to sign for the shipowners, and that it must be presumed that they acted in pursuance of the obligation. I will not ask whether their express evidence that they did not do so was admissible or not, though I do not see why it was not; but all the circumstances seem to me to shew that in fact they did not do so; nor do I see that there was such an obligation upon them to do so as would support the argument. It may be that, as pointed out in *Tillmanns & Co.* v. *S.S. Knutsford* (3), they would have had authority, by reason of the charterparty, to sign on behalf of the master, without any further communication with the owners, but that carries one no further unless it is established that they did sign on behalf of the master. An obligation is suggested to sign on behalf of the master in order to give the shipowner the benefit of the lien upon cargo mentioned in clause 25 of the time charter, but this suggestion fails because that object could

(1) (1906) 11 Com. Cas. 115. (2) [1905] 2 K. B. 92.
(3) [1908] 2 K. B. 385.

C. A. 1913

THE OKEHAMPTON.

Hamilton L J.

equally well be attained by reserving in the bill of lading such a consent to the goods being subjected to the ship's lien for time-hire as would compel the holder of the bill of lading, if the goods were carried on the faith of that term, to allow the goods to be detained for the benefit of the shipowner and in exercise of his lien. Also it would have been sufficiently attained if at Hamburg, in order to exercise a lien on the sub-freights, the master, or the shipowner, had exercised his right either to take possession or to treat his possession as now being a possession on the ship's behalf and not on Messrs. MacAndrew & Co.'s behalf, and so had collected the sub-freights against delivery of the cargo and retained the sub-freights themselves; but there is no express obligation, and I think none can be implied in this charterparty, that the cargo shall be loaded, in order that the shipowner may have the benefit of the lien. We cannot construe clause 25 as imposing an obligation on Messrs. MacAndrew & Co. to sign the bill of lading on behalf of the shipowner, and in any case that obligation, if it existed, they did not carry out.

There remain two other points. I think it may be inferred as a matter of fact that the goods were in the possession of MacAndrew & Co., the contracting carriers, performing their contract by means of a hired ship, so long as they were discharging their obligation with regard to the payment of hire; but the passage cited from Pollock and Wright on Possession in the Common Law, at p. 166, par. 4, is, I think, quite sufficient authority for saying that even if the shipowners had possession so as to make them sub-bailees to Messrs. MacAndrew, such bailment was revocable at pleasure, and there was no adverse right in the shipowners, so long as the time-hire was paid by Messrs. Blom. Accordingly, there was interest enough in the plaintiffs to entitle them to bring this action.

Then was that interest determined at the moment of the collision, because there was some sub-charter hire in arrear? I think that point fallacious. So far as appears, and there is no evidence whatever to the contrary, all the hire due to the shipowners was punctually paid in advance by Messrs. Blom. The shipowners had no right to convert the possession held at the mandate of Messrs. MacAndrew into a possession held adversely to them in the exercise of a possessory lien. They had a right

C. A. 1913

THE OKEHAMPTON.

Hamilton L.J.

to exercise a lien in a certain event, but that event did not happen. Messrs. Blom had a contractual right of the same kind, because the sub- and head-charters are in the same form, and although they in their turn, when the sub-charter hire fell for a few days in arrear, had the right to ask the shipowners to exercise a possessory lien on their behalf as soon as they could communicate with the master, they had no possession till that right was exercised. There is no evidence that they ever purported to exercise it or purported to call on the shipowners to exercise it, or that anything whatever was done in the matter. Since the collision they have in fact accepted satisfaction for the arrears of hire in money. I think that the plaintiffs could down to the time of the collision recall the bailment to the shipowners, if any, at pleasure and are therefore entitled to maintain the action.

It has been contended, and I think with some truth, that if the person who is liable on the contract of carriage and the bills of lading brings an action for the loss in respect of his bill of lading freight separately from the action which is brought by the shipowners, the result may be to harass the wrong-doing defendant vessel and perhaps to make the defendants pay more than otherwise would be the case; but it seems to me that a way could be found in such a case to prevent the wrong-doing ship from paying in the aggregate more than the actual damage which has been suffered by the various parties interested. I think the appeal should be allowed.

Judgment below set aside. The question of amount, failing agreement between the parties, to be referred to the registrar and judgment entered for the appellants (plaintiffs) for that amount. The appellants (plaintiffs) to have their costs here and below, other than the costs of the second inquiry before the registrar, and as to that no costs on either side.

Solicitors for appellants (plaintiffs): *Trinder, Capron & Co.*

Solicitors for respondents (defendants): *William A. Crump & Son.*

T. L. M.

1913
July 10.

[IN THE ARCHES COURT OF CANTERBURY.]

THE OFFICE OF THE JUDGE PROMOTED BY THE BISHOP OF ELY *v.* CLOSE.

APPEAL FROM THE CONSISTORY COURT OF ELY.

Ecclesiastical Law—Jurisdiction—Criminal Suit under Clergy Discipline Act, 1892 (55 & 56 *Vict. c.* 32)—*Appeal in Matter of Law—Clergy Discipline Act*, 1892, *ss.* 2, 12, 13—*Immoral Act—Offence against the Laws Ecclesiastical being an Offence against Morality and not being a Question of Doctrine or Ritual—Canons of* 1603, *Canons* 75 *and* 109—*Writing and sending by Clergyman of an Obscene and Indecent Letter to an Unmarried Woman—Offence justiciable under Clergy Discipline Act*, 1892—*Remission of Cause—Clergy Discipline Act Rules*, 1892, *rr.* 72, 95—*Practice—Costs.*

By the 2nd section of the Clergy Discipline Act, 1892, if any clergyman, defined by the 12th section of the same Act to mean, unless the context otherwise requires, a clergyman not being the bishop of a diocese who is in holy orders in the Church of England, is alleged to have been guilty of any immoral act, immoral conduct, or immoral habit, or of any offence against the laws ecclesiastical being an offence against morality and not being a question of doctrine or ritual, he may be prosecuted by the bishop of the diocese and tried in the Consistory Court of the diocese in which he holds preferment in accordance with the prescribed procedure subject as in the same section mentioned, whilst the 5th section of the same Act provides that a complaint under the Act for an offence shall not be made after five years from the date of the offence or of the last of a series of acts alleged as part of the offence, with an exception in cases of conviction by a temporal Court.

The incumbent of a parish—a married man—was charged in a criminal suit instituted under the Clergy Discipline Act, 1892, with having within five years then last past been guilty of immoral acts, immoral conduct, and of offences against the laws ecclesiastical being offences against morality in that he wrote and sent by post addressed to A. B., an unmarried woman, then or lately a parishioner of and resident in the parish, an obscene and indecent letter. The defendant appeared in the suit and brought in a defence which, after admitting and deeply regretting the writing of the letter and pleading that at the time the defendant wrote it he had not had control over his feelings and was unable to appreciate the meaning of what he was writing, submitted that the letter was not in itself sufficient to constitute an offence under the Clergy Discipline Act, 1892. At the hearing of the suit in the Consistory Court of the diocese in which the defendant held preferment evidence in support of the charge was given by witnesses

1913

ELY (BISHOP) v. CLOSE.

for the prosecutor, but the judge of the Consistory Court after hearing arguments, without any evidence having been adduced on behalf of the defendant, dismissed the prosecution on the ground that the charge was not one maintainable under the Clergy Discipline Act, 1892. The prosecutor appealed to the Arches Court of Canterbury:—

Held, that the act charged against the defendant was "an immoral act" within the meaning of those words in the 2nd section of the Clergy Discipline Act, 1892, and constituted an offence justiciable under that Act.

Held, also, that, assuming the act charged against the defendant was one for which he might have been prosecuted in a temporal Court, the fact that no such prosecution had taken place would not have been a bar to the proceedings in the Court below.

The writing and sending by a clergyman of an obscene and indecent letter to an unmarried woman is an offence for which the clergyman can be tried under the 2nd section of the Clergy Discipline Act, 1892, within five years of the date of the offence.

Observations as to the procedure to be followed in cases where the dismissal of a prosecution under the Clergy Discipline Act, 1892, is claimed on the ground that the charges under that Act are not maintainable in respect of matter of law.

THIS was an appeal in matter of law from the Consistory Court of the diocese of Ely in a cause of the office of the judge promoted by the Bishop of Ely under the Clergy Discipline Act, 1892, against the Reverend Robert Wells Close, vicar of the parish of St. Matthew's, Littleport, in the county of Cambridge and diocese of Ely.

The complaint in the suit was dated March 12 last, and the particulars of charges therein alleged that "the defendant had been guilty of immoral acts immoral conduct and of offences against the laws ecclesiastical being offences against morality within five years last past viz. that he the defendant R. W. Close being a clerk in holy orders and vicar of the parish of St. Matthew's Littleport in the diocese of Ely on or about the 14th of November 1912 wrote and sent by post on or about the 15th of November 1912 addressed to Miss A. B. at . . . . the said A. B. being then or lately a parishioner of and resident in the parish of Littleport aforesaid an obscene and indecent letter a copy of which letter has been supplied to the defendant."

The defendant appeared in the suit, and on his behalf on March 29, 1913, an answer was brought in to the following

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1913

ELY (BISHOP) v. CLOSE.

effect:—"Charge 1 admitted. The writing of the letter is admitted, but it was written at a time when the defendant had no control over his feelings and was unable to appreciate the meaning of what he was writing. The defendant will further submit that the said letter the writing of which he deeply regrets is not in itself sufficient to constitute an offence under the Clergy Discipline Act, 1892."

On May 30 last the cause came on to be heard in the Consistory Court of Ely before the Chancellor of the diocese of Ely (George J. Talbot, Esq., K.C.) without assessors, and the letter the subject-matter of the charge in the complaint was produced in Court and admitted to be in the handwriting of the defendant and to have been addressed by him to the unmarried woman named in it, being the same person mentioned in the complaint as the addressee of the letter in question and designated in this report as Miss A. B., and witnesses were called and examined for the prosecutor in support of the complaint and cross-examined on behalf of the defendant, but, after hearing arguments for the prosecutor and the defendant, the Chancellor of the diocese, before any witnesses had been called on behalf of the defendant, stopped the case and, without expressing any opinion whether the sending of the letter was a common law offence or whether if it were the jurisdiction of the Consistory Court was thereby ousted, held, on the authority of the case of *Moore* v. *the Bishop of Oxford* (1), that the writing and sending of a single obscene letter was not an offence under the Clergy Discipline Act, 1892, and accordingly dismissed the prosecution, the judgment delivered by the Chancellor being in substance as follows:—

THE CHANCELLOR. This is certainly a most deplorable case. I have read the letter which the defendant is charged with having written, and a more disgusting and disgraceful letter has certainly, I suppose, never been disclosed in any Court of justice. I am bound to say, having read the letter and knowing it to have been written on more than one occasion and to have taken a good deal of time to write, that I see no trace in it of any mental infirmity or of anything except an obscene and

(1) [1904] A. C. 283.

1913

ELY (BISHOP) v. CLOSE.

The Chancellor.

polluted mind. The man who was capable of writing that letter is certainly unfit for the office of parish priest, and whatever else may be said of the case, undoubtedly the bishop of the diocese was fully justified in bringing the matter before the Court. I express no opinion as to whether the defendant might be made amenable before another tribunal for having written the letter, but the question I have to deal with is whether the act of writing the letter and sending it to the unmarried woman named in it is or is not an offence cognizable under the Clergy Discipline Act, 1892. Under the 2nd section of that Act—within which section the prosecutor claims to have brought the charge against the defendant—the matter charged must be either an immoral act, immoral conduct, or immoral habit, or an offence against the laws ecclesiastical being an offence against morality and not being a question of doctrine or ritual. Now the decision of the Judicial Committee of the Privy Council in the case of *Moore* v. *the Bishop of Oxford* (1) has I think established two propositions of law material in this case, the first being that the use of obscene language is not "an immoral act" within the meaning of those words in the 2nd section of the Act. I cannot draw any valid distinction for this purpose between spoken and written words. I do not think the letter can fairly be described as amounting to a solicitation of chastity and it is not so described in the complaint. Was then the writing and sending of the letter "immoral conduct" or "an immoral habit"? That the writing and sending of the letter was not an immoral habit is I think quite clear without the authority of any case being required; and the judgment to which I have referred shews that in the Act the words "conduct" and "habit" have the same meaning. In the result it appears to me that the inference I am bound to draw from the case of *Moore* v. *the Bishop of Oxford* (1) is that the mere writing of a single letter, however obscene and disgraceful it may be, does not constitute an offence under the 2nd section of the Clergy Discipline Act, 1892. I must therefore dismiss the prosecution. I am not prepared to hold that if an offence against ecclesiastical law is an offence cognizable in the temporal Court it can only be

(1) [1901] A. C. 283.

1913

ELY (BISHOP) v. CLOSE.

adjudicated on in the spiritual Court after it has been tried in the temporal Court.

The prosecutor asserted an appeal to this Court.

1913. July 9. The appeal was heard before the Dean of the Arches (Sir Lewis T. Dibdin, D.C.L.).

It appeared from the evidence for the prosecutor taken in the Court below that the defendant was a married man at the time he wrote the letter the subject-matter of the charge in the complaint; that Miss A. B. was at that time about twenty-eight years of age; and that the above-mentioned letter when received at the place to which it was directed had not been opened by her, but had been sent on unopened to a male relation at Littleport, who after reading it had eventually handed it to the legal secretary of the Bishop of Ely.

E. W. Hansell and *M. E. Hansell* appeared for the appellant.
H. S. Q. Henriques appeared for the respondent.

On the appeal being called on, the counsel for the respondent took a preliminary objection that the appeal was an appeal on fact as well as on law, a decision on evidence having been given in the Court below, and that so far as it was an appeal on fact leave to appeal must be obtained before the appeal—an appeal on mixed law and fact—could be heard. This preliminary objection was overruled by the Court without calling on the counsel for the appellant, the Court holding that the appeal before it was an appeal in respect of matter of law within the 4th section of the Clergy Discipline Act, 1892.

E. W. Hansell and *M. E. Hansell*, for the appellant. The decision of the judge of the Court below was wrong in law and ought to be reversed. The complaint charges the respondent with writing and sending to an unmarried woman lately residing in the parish of which he is incumbent an obscene and indecent letter within the last five years. These facts so alleged in the complaint were admitted or proved by evidence called on behalf of the appellant and clearly constitute an offence justiciable in the

Consistory Court of the diocese where the respondent holds preferment under the 2nd and 5th sections of the Clergy Discipline Act, 1892. (1) The respondent is not charged with immoral conduct or an immoral habit, but the writing and sending the letter as charged was "an immoral act and an offence against the laws ecclesiastical being an offence against morality" within those words in the above-mentioned 2nd section of the Act. The immoral act charged is "ribaldry" within that expression in the 109th canon of 1603, and similar isolated immoral acts have constantly formed the subject-matter of proceedings against defendants both under the older ecclesiastical law and under the Clergy Discipline Act, 1892. [They referred to the following authorities: The New Century Dictionary, voce "Ribaldry"; the Oxford English Dictionary, ibid.; *The Bishop of Rochester* v. *Harris* (2); *Fitzmaurice* v. *Hesketh* (3); *Sweet* v. *Young* (4); *The Dean of Jersey* v. —— (5); *Burder* v. —— (6); *Beneficed Clerk* v. *Lee*. (7)] The judge of the

(1) The material portions of the 2nd and 5th sections of the Clergy Discipline Act, 1892, are as follows:—

Sect. 2: "If a clergyman" [defined by s. 12 of the Act to mean, unless the context otherwise requires, a clergyman not being the bishop of a diocese who is in holy orders in the Church of England] ". . . . is alleged to have been guilty of any immoral act, immoral conduct, or immoral habit, or of any offence against the laws ecclesiastical being an offence against morality and not being a question of doctrine or ritual, he may be prosecuted . . . . by the bishop of the diocese . . . . and tried in the Consistory Court of the diocese in which he holds preferment and may be so prosecuted and tried in accordance with the prescribed procedure subject . . . . " [as in the same section mentioned].

Sect. 5: "A complaint under this Act for an offence shall not be made after five years from the date of the offence or of the last of a series of acts alleged as part of the offence except that complaint may be made within two years after a conviction by a temporal Court becomes conclusive."

By the 12th section of the same Act it is provided as follows: "The expressions "immoral act" "immoral conduct" and "immoral habit" shall include such acts, conduct, and habits as are proscribed by the seventy-fifth and one hundred and ninth canons issued by the Convocation of the Province of Canterbury in the year one thousand six hundred and three."

[The text of the 75th and 109th canons of 1603 is set out in a note to the case of *The Bishop of Rochester* v. *Harris* [1893] P. 139, n. 3.]

(2) [1893] P. 137.

(3) [1904] A. C. 266.

(4) [1902] P. 37.

(5) (1840) 3 Moo. P. C. C. 229.

(6) (1844) 3 Curt. 822.

(7) [1897] A. C. 226.

1913

ELY (BISHOP) v. CLOSE.

Court below dismissed the prosecution because he considered that he was bound to do so in consequence of the decision of the Judicial Committee of the Privy Council in *Moore* v. *the Bishop of Oxford* (1); the Judicial Committee having in that case decided, in his opinion, that the acts, conduct, habit, and offences in the 2nd section of the Clergy Discipline Act, 1892, were all confined to habitual acts, conduct, habits, and offences. This opinion is erroneous, and the case of *Moore* v. *the Bishop of Oxford* (1) has no direct bearing on the present case, the charge proceeded on there having been a charge of habitual swearing and ribaldry, and the Judicial Committee having come to the conclusion that the few instances of swearing proved in that case in the course of three years did not amount to an immoral habit within the 2nd section of the Clergy Discipline Act, 1892. It is very doubtful whether the immoral act charged here would be cognizable in the temporal Court, but even assuming that it could be tried there, the jurisdiction of the spiritual Court is not in that case, as counsel for the respondent contended in the Court below, ousted, the proceedings in the spiritual Court being for other objects than the proceedings in the temporal Court: *Slader* v. *Smalbrooke* (2); *Townsend* v. *Thorpe* (3); *Free* v. *Burgoyne* (4); *Borough* v. *Collins*. (5) No general rule to the contrary was laid down by Lord Penzance in *In the Matter of A. B.* (6), though in that case, which involved a most serious criminal offence, the acceptance of letters of request was in the discretion of the Court refused, no proceeding having been taken in the temporal Court.

H. S. Q. Henriques, for the respondent. This appeal ought not to be entertained by the Court, for if it is, the respondent, contrary to all principles of law, is put in jeopardy a second time, inasmuch as, owing to the course which the suit took in the Court below, evidence for the prosecutor was taken against the defendant and the prosecution was dismissed, instead of a preliminary objection being taken to the jurisdiction, as in *Lee* v. *Flack*. (7)

(1) [1904] A. C. 283.
(2) (1664) 1 Lev. 138.
(3) (1727) 2 Ld. Raym. 1507.
(4) (1828) 2 Bli. (N.S.) 65.
(5) (1890) 15 P. D. 81.
(6) (1886) 11 P. D. 56.
(7) [1896] P. 138.

1913

ELY (BISHOP) v. CLOSE.

If, however, the Court is against the respondent on this point, first, the offence charged against the respondent is a criminal offence at common law and by statute—[he referred to *The Queen* v. *Adams* (1) and the Post Office Act, 1908 (8 Edw. 7, c. 48), s. 63, sub-s. 1 (*b*)]—and there is no jurisdiction in the Consistory Court to try him until he has been convicted in the temporal Court. [He cited *In the Matter of A. B.* (2)] Secondly, the writing and sending the letter referred to in the complaint to the person named in it is not an offence cognizable under the Act of 1892, because the case of *Moore* v. *the Bishop of Oxford* (3) shews that the offence charged here is not an "immoral act" within the meaning of those words in the 2nd section of the Act. In order to bring an offence within that section the wrong-doing charged must be more than an occasional wrong-doing.

E. W. Hansell replied.

Cur. adv. vult.

July 10. THE DEAN OF THE ARCHES. This is an appeal on a matter of law from a decision of the learned Chancellor of the diocese of Ely which in fact disposed of a prosecution pending before him under the Clergy Discipline Act, 1892, because he held that the prosecution was not maintainable. If I allow the appeal, which for reasons I shall presently state I propose to do, and hold that the prosecution is maintainable as a matter of law, the case will have to go back to the Consistory Court in order that the investigation of the facts may be completed. For I learnt during the argument, although it does not appear from the learned Chancellor's note of evidence, that the trial was not finished, but was suspended at the close of the prosecutor's case, at which point, after argument, judgment was given on the point of law which I have to decide. The defendant's evidence—and I understand he had witnesses whom he still wishes to call—was not heard because the learned Chancellor's decision, given as I have stated, disposed of the case.

(1) (1888) 22 Q. B. D. 66. (2) 11 P. D. 56.
(3) [1904] A. C. 283.

1913

ELY (BISHOP) v. CLOSE.

The Dean of the Arches.

I desire to say that this course, which is, I venture to think, unusual, may also be open to some objection on the ground of its inconvenience. It is perhaps worth consideration whether the plan usually adopted in proceedings under the Clergy Discipline Act, 1892, of letting a case be heard to the end before a decision is given is not better. Then in the event of appeal the whole matter can be disposed of at one time. This piecemeal method of dealing with a case is apt to cause delay and additional expense. The defendant may even be prejudiced by a discussion of his case before his account of it has been given, although the discussion is of a point of law only, based on the assumption that the prosecutor's case has been proved.

The defendant is an incumbent of the diocese of Ely who has been in orders more than forty years and must therefore be considerably above sixty years of age. He is also married. He seems to have formed an acquaintance with a young unmarried woman, a parishioner, and to have visited her at her home under circumstances which excited the suspicion of her relatives, with the result that she was sent away to stay with an aunt in London. Within a few days of her arrival a letter admitted to be in the handwriting of the defendant and addressed by him to the young woman was delivered by post at the aunt's house. The letter was intercepted and is the subject-matter of this prosecution. It is of considerable length, not written all at once, but in portions during a period of two or three days. It is throughout of a passionately erotic character, and the latter part of it is undisguisedly lewd and openly expresses the writer's lustful thoughts and desires. It also contains a rough drawing of great indecency. The defendant by his answer "deeply regrets" having written this letter and pleads that he wrote it at a time when he "had not control over his feelings and was unable to appreciate the meaning of what he was writing." His evidence has not yet been heard and I must not be understood to express any opinion as to how far he was or was not accountable for his actions. Whatever there may be to be said by way of explanation or extenuation will doubtless be duly weighed by the learned Chancellor.

1913

ELY (BISHOP) v. CLOSE.

The Dean of the Arches

This prosecution was instituted by the Bishop of Ely and the offence charged is the writing and sending of this letter which is described as obscene and indecent. The charge is made under the 2nd section of the Clergy Discipline Act, 1892, which enacts that if a clergyman is alleged to have been guilty of any immoral act, immoral conduct, or immoral habit, or of any offence against the laws ecclesiastical being an offence against morality and not being a question of doctrine or ritual, he may be prosecuted as in the Act provided.

The prosecutor's case was that the writing and sending of the letter I have described was an immoral act. In the 12th section of the Clergy Discipline Act, 1892, it is enacted that the expressions immoral act, immoral conduct, and immoral habit shall include such acts, conduct, and habits as are proscribed by the 75th and 109th canons of 1603. The 75th canon requires clergymen "to excel all others in purity of life" and to be "examples to the people to live well and christianly." The 109th canon proscribes adultery, whoredom, incest, drunkenness, swearing, ribaldry, usury, "and any other uncleanness and wickedness of life." It was not denied and I do not think it admits of doubt that the defendant's action was at variance with the standard laid down by these canons. I desire to add that independently of and long before the Canons of 1603 the indulgence of lewd impulses by a clergyman, in licentious acts or indecent words tending to corrupt another person, was regarded as rendering the clergyman liable to disciplinary proceedings in the Ecclesiastical Courts, even although a definite offence such as adultery or fornication might not be charged. Thus Coke, commenting on the Statute Circumspecte Agatis (13 Edw. 1), which leaves "fornication, adultery and such like" to the cognizance of the spiritual Courts, says of the words "such like": "These are to be taken for offences of like nature as the two offences here particularly expressed be: as solicitation of any woman's chastity" (1), &c. The old cases provide not a few instances which fall under this category and the text-books state the law in the same way. (2) I think therefore that the defendant by

(1) 2 Inst. 488.

(2) E.g. Oughton's Ordo Judiciorum, p. 11; Ayliffe's Parergon, p. 239.

1913

ELY (BISHOP) v. CLOSE.

The Dean of the Arches.

writing and sending this letter to this young woman certainly committed an ecclesiastical offence.

The defendant's case, however, so far as the question of law before me is concerned, is not that he has not committed an ecclesiastical offence, but that it is not such an offence as can be brought home to him in a proceeding under the Clergy Discipline Act, 1892. He has two points. In the first place he says that the offence with which he is charged is a criminal offence at common law and that he cannot be prosecuted in the Ecclesiastical Court until he has been convicted in the civil Court. I think this contention is founded on a misapprehension. It assumes the continuance of a state of the law which existed before the Act of 1892 and which it was one of the objects of that Act to remedy. Under the old system, which the Church Discipline Act of 1840 did not alter in this respect, the Ecclesiastical Courts were faced with a great difficulty in dealing with charges of crime against clergymen. If the charge was one in respect of which the accused was liable to prosecution in the criminal Courts, especially if the crime charged was a felony, the spiritual Court could not proceed in a suit for his punishment, or, as it is called, pro reformatione morum, although it might entertain a suit for his deprivation or suspension from benefice. But the Act of 1892 has entirely altered the position. First, the conviction of a clerk by a temporal Court for felony or grave misdemeanour or matrimonial misconduct ipso facto vacates any preferment held by him. Secondly, conviction by a temporal Court on any other charge which involves an ecclesiastical offence renders a clerk liable to a prosecution in the spiritual Court, in which the previous conviction in the temporal Court is decisive on the fact of his guilt. Thirdly, if a clerk is charged with any ecclesiastical offence which is also an offence against morality, whether it be an immoral act, immoral conduct, or an immoral habit, and there has been no conviction in a temporal Court, the accused may be prosecuted in the manner provided by the Act. So entirely is the old restriction removed that s. 13, sub-s. 1 (*c*), provides that the prosecution under the Act of a clerk in the Ecclesiastical Court shall not affect his liability to any prosecution, action, or proceeding in any temporal Court. If the fact of this

liability rendered a prosecution under the Act impossible, the sub-section I have mentioned would be both superfluous and misleading. If therefore the defendant were open to prosecution in a criminal Court, as to which I express no opinion, it would be no answer in this Court.

The defendant's second point is that his offence, namely, writing and sending an obscene letter, is not cognizable under the Act because that offence is not an "immoral act" within the meaning of those words as used in the Act. The learned Chancellor adopted this view and dismissed the prosecution. He considered himself to be acting on the authority of *Moore* v. *the Bishop of Oxford*. (1) In that case the defendant was charged with an "immoral habit," namely, being "habitually guilty of swearing and ribaldry." Lord Halsbury (delivering the judgment of the Judicial Committee of the Privy Council) doubted whether indulgence in the particular bad language proved to have been used, or other language of the same sort, though very reprehensible, could be properly described as an immoral act, at any rate within the meaning of the Clergy Discipline Act, 1892. But the wrong-doing charged in the case before me is of an entirely different description from that charged in *Moore* v. *the Bishop of Oxford* (1), and it would be absurd to regard Lord Halsbury's impression as to the one as if it had been stated about the other. In my opinion no doubt can be reasonably entertained that what the defendant did was immoral in the sense, already stated, in which that word is used in the Clergy Discipline Act, 1892. In my judgment it would be deplorable if it could be supposed that according to ecclesiastical law there were any question or uncertainty about it. But was what the defendant did also an "act" in a sense which would make it an offence under the Clergy Discipline Act, 1892? Lord Halsbury held, and this was the real ground of decision in *Moore* v. *the Bishop of Oxford* (1), that the occasional use of bad language did not justify a charge of its habitual use. In the present case the defendant is not charged with a habit but with an act. The learned Chancellor seems to have read the judgment to mean

(1) [1904] A. C. 283.

1913

ELY (BISHOP) v. CLOSE.

The Dean of the Arches.

that the words "act," "conduct," and "habit" in the Clergy Discipline Act, 1892, all mean the same thing, and that therefore no offence can be established under the Act which is not habitual. But, with great respect, that view is clearly mistaken. Lord Halsbury describes "immoral conduct" and "immoral habit" as being "probably the same thing," which in such a case as that before him they must be. But he did not say and, I venture to think, did not intend to say that an act and a habit are identical. They are words, so it seems to me, as clearly contrasted in the Act as they are in ordinary language; the one pointing to a single thing done, the other to a usage resulting from repeated action. The great majority of convictions under this statute, during the twenty years that it has been in operation, have been in respect of immoral acts, and not of immoral habits. It is obvious that if nothing except habitual misdoing could be dealt with, it would be impossible to proceed for single offences of drunkenness, fornication, or other immorality (not involving criminal prosecution) no matter how flagrant, and the Act would become almost a dead letter. All who have had practical experience in the administration of clerical discipline, will, I think, agree as to the great difficulty of proving an immoral habit, even where the evidence of an immoral act is perfectly clear. It seems to me therefore that *Moore* v. *the Bishop of Oxford* (1) was decided on its own facts and with reference to the form of the charge against the defendant in that case and has no direct bearing on the present case, where the facts and the charge are very different. I hold that the writing and sending the letter described in the complaint to the person therein named was not only immoral but was an immoral act within the meaning of the Clergy Discipline Act, 1892. The appeal is therefore allowed, and under the 72nd rule of the Clergy Discipline Act Rules the case will be remitted to the Consistory Court of the diocese of Ely in order that such further proceedings as may be necessary may be taken in that Court. The respondent must pay the appellant his costs of this appeal. The learned Chancellor will deal with the

(1) [1904] A. C. 283.

general costs of the prosecution when the hearing has been completed.

Appeal allowed and cause remitted to the Consistory Court of Ely. (1)

Solicitors for appellant: *Lee, Bolton & Lee.*

Solicitor for respondent: *A. T. Lyon.*

(1) The remitted cause came on to be heard in the Consistory Court of Ely before the Chancellor of the diocese of Ely on July 24, 1913, when a doctor was called as a witness on behalf of the defendant and gave medical evidence for the purpose of supporting the allegations in the answer as to the defendant's state of mind when he wrote the letter the subject-matter of the prosecution. After hearing this evidence and the counsel for the defendant, the Chancellor held that the charge in the complaint had been sufficiently proved; adjudged the defendant guilty in pursuance of the Clergy Discipline Act, 1892, of an immoral act and an offence against the laws ecclesiastical being an offence against morality within five years last past, and adjourned the cause, stating that he would notify to the Bishop of Ely that the defendant had been found guilty and what sentence should be passed on the defendant. [The Court sat at the Church House at Westminster, both the prosecutor and the defendant having consented to time and place.]

On the 1st of August last a Consistory Court of the diocese of Ely was held at Ely, and the Bishop of Ely pronounced in the suit a sentence of deprivation against the defendant, depriving the defendant of all his ecclesiastical promotions within the diocese of Ely and especially of the vicarage of St. Matthew's, Littleport, and all rights, profits, and benefits appertaining thereto.

C. F. J.

1913

July 15, 30, 31.

DICKINSON *v.* DICKINSON (otherwise PHILLIPS).

Nullity of Marriage—Wilful and Persistent Refusal to allow Marital Intercourse—Decree.

Wilful and persistent refusal to allow any marital intercourse is a sufficient ground for a decree of nullity of marriage.

Where, upon a petition for nullity of marriage presented by the husband in good faith, it appeared that the consummation of the marriage had been prevented, after repeated attempts on his part, by the wilful, determined, steadfast refusal of the wife, and the refusal was threatened to be, or likely to be, persisted in, the Court (Sir Samuel Evans, President) held that this constituted a valid and sufficient ground for annulling the marriage.

This was a suit by the husband for nullity of marriage.

The facts sufficiently appear in the considered judgment of the learned President.

The suit was undefended.

The hearing took place and the judgment was delivered in open Court.

W. O. Willis (for the petitioner) asked the Court to draw an inference of incapacity from the wilful wrongful refusal of the wife to allow consummation.

[Sir Samuel Evans, President. I shall not draw an inference of incapacity on the part of the wife, although I have no doubt that she is in the wrong, and I believe all the husband has said.]

Willis cited *D. (falsely called F.)* v. *F.* (1)

[Sir Samuel Evans, President. That was a case of wife against husband, and in that case there was evidence of impotency. I want you to persuade me that on the ground only of wilful refusal I can grant a decree of nullity. What is revolting to me is that in these cases the Court has granted a decree of nullity of marriage on the ground of inferred incapacity and shortly afterwards the parties have married again and had children.]

Willis cited *S.* v. *A. (otherwise S.).* (2)

(1) (1865) 34 L. J. P. & M. 66. (2) (1878) 3 P. D. 72.

1913

DICKINSON v. DICKINSON.

[SIR SAMUEL EVANS, PRESIDENT. That case is against you on the facts in the present case, as Sir James Hannen says that wilful wrongful refusal is not sufficient.]

Willis cited *H.* v. *P.* (*falsely called H.*). (1)

[SIR SAMUEL EVANS, PRESIDENT. In that case there was evidence of hysteria, but in the present case there is no evidence to indicate nervousness. I have said before I do not like these legal fictions. You want me to draw an inference which, on the facts in the present case, I cannot. I want to decide in your favour if I can find that wilful refusal by itself is enough.]

Willis cited *M.* (*falsely called H.*) v. *H.* (2)

[SIR SAMUEL EVANS, PRESIDENT. The Court in that case held that the man was not impotent.]

Willis cited *B.* (*otherwise H.*) v. *B.* (3); and also, as to the application of the inference, *M.* v. *M.* (*otherwise H.*) (4); *S.* v. *S.* (*otherwise M.*) (5); *C.* v. *C.* (*otherwise H.*) (6); *F.* v. *P.* (*otherwise F.*) (7)

[SIR SAMUEL EVANS, PRESIDENT. I think it carries the case further if the respondent admits he or she is incompetent. Supposing the wife to say that she will not have children and therefore that she will not let her husband touch her, then one of the objects of marriage is defeated.]

Willis cited *W.* v. *W.* (*otherwise L.*). (8)

[SIR SAMUEL EVANS, PRESIDENT. There was more in the case of *W.* v. *W.* (*otherwise L.*) (8) than in the present case, because in that case the wife said she never could be a wife and that medical inspection would be useless.

The learned President referred to the case of *W.* v. *S.* (*otherwise W.*). (9)]

Willis cited *B.* v. *L.* (*falsely called B.*). (10)

[SIR SAMUEL EVANS, PRESIDENT. Why should not mere wilful refusal be sufficient? Is there any danger to the State or the parties in so holding? It used to be necessary to allege that

(1) (1873) L. R. 3 P. & M. 126.
(2) (1864) 3 Sw. & Tr. 517, at p. 519.
(3) [1901] P. 39.
(4) (1906) 22 Times L. R. 719.
(5) (1908) 24 Times L. R. 253.
(6) (1911) 27 Times L. R. 421.
(7) (1911) 27 Times L. R. 429.
(8) [1912] P. 78.
(9) [1905] P. 231.
(10) (1869) L. R. 1 P. & M. 639.

1913

DICKINSON v. DICKINSON.

the impediment was incurable by art or skill, but that is no longer necessary.]

Willis cited *Pollard* (*falsely called Wybourn*) v. *Wybourn*. (1)

[SIR SAMUEL EVANS, PRESIDENT. Have you the case of *T.* v. *M.* (*falsely called T.*)? (2) The law has advanced since then. Is there any reason why it should not advance a little further?]

Cur. adv. vult.

July 31. SIR SAMUEL EVANS, PRESIDENT. In this case, notwithstanding repeated attempts by the husband, the marriage was not consummated by reason of the refusal of the wife. The marriage took place in 1912, the ages of the husband and wife being stated to be forty-one and thirty-three respectively. It is said that the wife was rather older, and that she approached more nearly the age of her husband. Her reasons for refusing the husband's advances were that she did not want to have children; that she did not wish to have intercourse, because it was unnecessary, vulgar, rude and disgusting; and that many of her married friends lived without such intercourse, and she wished to do the same.

She took effective steps as described by the husband to prevent his effecting his marital desires. The husband after about a month had a nervous breakdown, which caused him one day to seek consolation in very excessive drinking of intoxicants, and which he and the doctor who attended him attributed to the strain which had been put upon him by his wife's conduct. For about five days he was in a home. He afterwards saw his wife several times and asked her to cohabit with him. She declined. Subsequently he wrote her this letter:—

"1st February, 1913.

"My dear Minnie.

"Since our last meeting I have been thinking very seriously over all that you have said and our relative positions.

"If you really do not intend to live with me (anywhere you like) as husband and wife, which I sincerely hope you do not

(1) (1828) 1 Hagg. Ecc. 725. (2) (1865) L. R. 1 P. & M. 31.

mean, then it will be necessary for me to seek advice, as my position is absurd, being neither married nor single.

"Under these circumstances, you will I hope, think carefully over everything again and the prospect of happiness to both of us.

"I will say no more now, but ask you to let me have a definite reply from you and I can only hope that you will have changed your views and feelings on the subject.

"Your sorrowful husband,

"Charles Dickinson."

She replied with the following letter:—

"February 4th, 1913.

"Dear Charlie.

"I received your letter of the 1st instant and, as you wished, I have thought the matter over again. I do not see that there is anything I can say contrary to what I have already stated, that is, that I do not intend to live with you in the way you mention, I knowing the sort of man you are, and as your ideas of matrimony are quite different to mine. You know perfectly well that when we were first engaged I hinted as plainly as possible what my intentions were. I told you I liked separate rooms. I also told you that I never wanted to have children. I thought that was plain enough and I certainly had no reason to think that you did not quite understand or that you objected.

"It is ridiculous, as I have said before, for you now to blame me and to say that I am the cause of your upsetting yourself. Whatever your nerves or your health may be, I can only say that if you are apt to take to drink at any time you may get disappointed or thwarted, I am thankful I have found you out as soon as I have. If you ever had any doubt as to my meaning before, which possibly you may have had, you need not now. My intentions are the same now as they ever were, and I need scarcely repeat them. I will never live with you as man and wife as you call it and therefore as you do not wish to live with me in any other way it is obvious that we cannot live together at all. In fact I have decided now not to live with you at all in any circumstances.

1913

DICKINSON v. DICKINSON.

The President.

"I am trying to let this house in order that I can get away as I am of course extremely unwell and badly want some rest and peace.

"Yours sincerely,
"Minnie Dickinson."

She has not changed the attitude she then took up. She has not defended the suit. She failed to obey the order directing her to be medically examined by the doctors attached to this Court.

The husband attended and was reported to be in every way normal.

I was asked by petitioner's counsel to draw an inference from the facts proved that there was some physical abnormality or incapacity in the respondent, and upon that ground to grant a decree of nullity. I have no reason to believe that the wife has any physical incapacity for the act of intercourse. As Lord Stowell said in *Briggs* v. *Morgan* (1), "A person need not be a profound physiologist to know how rarely the structure of the body is deficient for the purposes of our nature. Malformation is not common in our sex, and perhaps is still more uncommon in the other; and where it does exist, and is known to the parties, it naturally deters them from contracting marriage." In the present case, while the parties lived together, the wife passed through the period which is the lot of a healthy woman in the ordinary course of nature at that age; she did not shew any signs or make any suggestion of incapacity; and the husband declared in evidence that he thought it was simply a case of refusal. I believe it was. I do not believe there was any incapacity. I am asked to draw some inference which my reason tells me I ought not to draw. I decline to do so.

Is then the husband without any legal remedy? Can the Court decree an annulment of the marriage; or must the parties remain bound by the matrimonial tie, until one of them commits the matrimonial offences which are necessary to enable the Court to dissolve it, and the other invokes the aid of the Court for that purpose?

It has been said, and often said, that a wilful wrongful refusal of marital intercourse is not in itself sufficient to justify the

(1) (1820) 3 Phillim. 325, at p. 327.

Court in declaring a marriage to be null. What the origin of the rule or principle is, it is not easy, nor is it essential or particularly helpful, to ascertain. A statement to the above effect was made by Sir James Hannen in *S.* v. *A.* (*otherwise S.*) (1); but he decided the case in favour of the woman on other grounds. He follows up the statement by the following passage: "However much we may revolt from the idea of a man using force to compel his wife to have intercourse with him—and such a feeling is one which probably is much stronger at the present day than in past times—no case has gone the length of saying because a man naturally abstains from using force, that therefore the refusal, if it be a merely wilful refusal on the part of the wife, will justify him in coming to the Court and asking that it shall be declared that the marriage is void. Recent cases only establish this in advance of previous decisions, viz., that where a woman is shewn not to have had intercourse with her husband after a reasonable time for consummation of the marriage, if it appears that she has abstained from intercourse, and resisted her husband's attempts, the Court will draw the inference that that refusal on her part arises from incapacity."

Upon this subject the law has not stood still. It has been advanced on various points by the instrumentality of judicial decisions, so as to be brought into conformity with more modern ideas.

At one time the law required a cohabitation for three years—the "triennium" or the "triennalis cohabitatio"—in order to ascertain whether the non-consummation of the marriage was due to mere coyness on the part of the woman, or whether there was any physical incapacity. That is no longer necessary. Decrees have been made where the parties had only lived together for a much shorter period.

It was said by Lord Penzance in 1865, that a medical inspection of the respondent was invariably required in nullity cases where impotency was the groundwork of the suit, and that if the evidence was not sufficient to establish the proposition that the wife (respondent) was the subject of incurable malformation, precluding consummation of the marriage, the Court could not

(1) 3 P. D. 72, at p. 73.

1913

DICKINSON v. DICKINSON.

The President.

grant a decree of nullity. That has been changed, and it is no longer the law.

For a long period the form of pleading was that the incapacity alleged was "incurable by art or skill, and will so appear on inspection." Some years ago it was held by Sir Francis Jeune that those words were mere surplusage: *F.* v. *P.* (*falsely called F.*). (1)

And by degrees where the cohabitation was for a very short period—for some days only—and even where there had been no cohabitation at all, if by reason of refusal the marriage had not been consummated by intercourse, the Court in order to grant relief has acted upon the theory that an inference of incapacity can be drawn. (See *M.* v. *M.* (*otherwise H.*) (2); *S.* v. *S.* (*otherwise M.*) (3); *C.* v. *C.* (*otherwise H.*) (4); *F.* v. *P.* (*falsely called F.*). (5))

In recent years, it appears that in several cases relief has been given by the granting of decrees of nullity where there have scarcely been any circumstances beyond a mere wilful refusal; and in some cases indications have been given that the fiction or theory of inference of incompetency from such refusal is not regarded as satisfactory. (See *B.* (*otherwise H.*) v. *B.* (6), *W.* v. *S.* (*otherwise W.*) (7), and *W.* v. *W.* (*otherwise* L.). (8))

Is there any good reason why it should not now be held that a mere wilful refusal, of the character hereafter described, to consummate the marriage is a sufficient ground for the Court to grant a decree of nullity? Such cases should be considered with great caution, and the Court must be satisfied that they are brought in good faith. By wilful refusal I do not mean a mere temporary unwillingness due to a passing phase, or the result of coyness, a feeling of delicacy, affected or real, or a nervous ignorance which might be got rid of or cured by patient forbearance, care, and kindness; but a wilful, determined, and steadfast refusal to perform the obligations and to carry out the duties which the matrimonial contract involves.

(1) (1896) 75 L. T. 192.
(2) 22 Times L. R. 719.
(3) 24 Times L. R. 253.
(4) 27 Times L. R. 421.
(5) 27 Times L. R. 429.
(6) [1901] P. 39.
(7) [1905] P. 231.
(8) [1912] P. 78.

It has always been held that the contract of marriage implies the ability to consummate it. In my opinion it also implies the willingness to consummate it.

What are the causes for which matrimony exists?

The Book of Common Prayer of the Church of England, which contains a form of solemnization of matrimony, (the form, and the only form, which by law is compulsory in this country, where the marriage is solemnized in the Established Church,) declares that the causes for which matrimony was ordained are, firstly for the procreation of children, secondly for a remedy against sin, and to avoid fornication, and thirdly for the mutual society, help, and comfort, that the one ought to have of the other.

The law and the Courts of this realm have always attributed matrimony to the same causes.

"As the first cause and reason of matrimony ought to be the design of having an offspring; so the second ought to be the avoiding fornication." (See Ayliffe's Parergon, 2nd ed. at p. 360.) And the law recognizes these two as the "principal ends" of matrimony, namely, "a lawful indulgence of the passions to prevent licentiousness, and the procreation of children, according to the evident design of Divine Providence": *D*—— v. *A*—— (*falsely calling herself D*——). (1) Or, to use the words of Lord Penzance in *G.* v. *G.* (2), "It is apparent enough that without sexual intercourse the ends of marriage, the procreation of children, and the pleasures and enjoyments of matrimony cannot be attained."

That the contract of marriage implies the willingness, as well as the capacity, to consummate it, I think, admits of no doubt. If the capacity or willingness is absent, the marriage of course is not absolutely void, but only voidable at the suit of the party conceiving himself or herself to be wronged.

Rutherforth in his Institutes (3) says: "The contract of marriage is so far complete as to be binding upon the parties, when each has consented to give the other a present right to their bodies respectively for the purposes of marriage. Consummation

(1) (1845) 1 Rob. Ecc. 279, at p. 298.

(2) (1871) L. R. 2 P. & M. 287, at p. 291.

(3) Bk. I. c. 15, s. ix.

1913

DICKINSON v. DICKINSON.

The President.

is no more than taking actual possession of what, by the previous contract, each had a right to.

"We are however to observe, that this contract, like all others, is binding conditionally: so that a failure of performance on one part releases the obligation on the other part. Impotency therefore on the part of the man, or incapacity on the part of the woman, will set the contract aside. The man and the woman have in words made over a right to their persons respectively for the purposes of marriage: but making over this right is in effect making over nothing, where one is impotent or the other incapable."

Equally correctly, in my opinion, might it be said that "making over this right is in effect making over nothing," where one of the parties wilfully and steadfastly refuses to make it over at all.

The question is one for the exercise of practical common sense. If the refusal of the wife, even though it were admitted and established that she suffered from no incapacity, is wilful, determined, and steadfast and intended to be persistent, what is the husband to do?

I desire respectfully to adopt a powerful passage from the judgment of Lord Penzance in *G.* v. *G.* (1) and to make a slight adaptation of it, and to apply it to the facts of this case.

It reads as follows: "The invalidity of the marriage, if it cannot be consummated on account of some structural difficulty, is undoubted; but the basis of the interference of the Court is not the structural defect, but the impracticability of consummation. If, therefore, a case presents itself involving the impracticability (although it may not arise from a structural defect) the reason for the interference of the Court arises. The impossibility must be practical. It cannot be necessary to shew that the woman is so formed that connection is physically impossible, if it can be shewn that it is possible only under conditions to which the husband would not be justified in resorting. The absence of a physical structural defect cannot be sufficient to render a marriage valid if it be shewn that connection is practically impossible, or even if it be shewn that it is only practicable after a remedy has been applied which the husband cannot enforce, and which the

(1) L. R. 2 P. & M. 287, at p. 291.

wife, whether wilfully or acting under the influence of hysteria, is determined not to submit to. The question is a practical one, and I cannot help asking myself what is the husband to do in the event of his being obliged to return to cohabitation in order to effect the consummation of the marriage? Is he by mere brute force to oblige his wife to submit to connection? Every one must reject such an idea. If not, what is he to do?"

Adapting that and applying it to the facts of this case, it appears to me that unless by brute force the husband obliged the wife to submit, the intercourse is practically impossible where the wife acts as she has done in this case and persists in so acting.

Whether the refusal arises from causes which are physical, or mental, or partly mental and partly physical, is a complex, profound, mysterious question which I am wholly incompetent to decide.

Whatever may be the cause or the determining factors which produced the refusal, the result is the same, and the marriage has remained unconsummated.

It might happen in this case, that if I inferred some physical incapacity, and annulled the marriage on that ground, the respondent would marry again and become the mother of children.

It has happened in other cases that husbands and wives, after their marriages have been annulled upon some supposed or inferred, but unproved, incapacity, have contracted other marriages and become fathers and mothers. I know that it has been held of a man that he may be frigidus versus hanc: it cannot by the nature of things be so easily held of a woman that she is frigida versus hunc; frigidity in this sense being synonymous with incapacity.

Such theoretical inferences as have been drawn in order to justify decrees of nullity are often stultifying and are not, in my judgment, satisfactory or reliable.

Where, as I find in this case, the suit is brought in good faith, and the consummation of the marriage has been prevented, after repeated attempts reasonably made on the part of the husband, by the wilful, determined, and steadfast refusal of the wife, and

1913

DICKINSON v. DICKINSON.

The President.

the refusal is threatened to be, or likely to be, persistent, I prefer to take the direct course of saying that this is a valid ground for annulling the marriage, instead of having recourse to the expedient of stating that I draw an inference of some physical abnormality or incapacity which I do not believe to exist.

I therefore grant the petitioner the decree for which he petitions, a decree nisi of nullity.

Solicitors: *Lawson, Gold & Lawson.*

H. D. G.

1913

July 17, 31.

McQUIBAN *v.* McQUIBAN.

Husband and Wife—Deed of Separation—Covenant not to sue for Restitution of Conjugal Rights—Bankruptcy of Husband—Arrears of Allowance under Deed proved for by Wife—Discharge—Effect—Petition for Restitution of Conjugal Rights—Decree.

The annual sum payable to a wife under a separation deed being provable in the husband's bankruptcy, but no action being maintainable against the husband, after he has obtained his discharge, under his covenant to pay the allowance specified in the deed, the deed is no bar to proceedings for restitution of conjugal rights subsequently instituted by the wife.

THIS was an undefended suit by the wife for restitution of conjugal rights. The parties were married on February 24, 1903, and there was one child issue of the said marriage. They lived together down to the year 1911, when negotiations took place with a view to a deed of separation, which was executed on December 7, 1911.

The deed contained, inter alia, the following clauses:—

"Neither of them the husband nor the wife shall require or compel or endeavour to compel the other of them to cohabit or dwell with him or her by any legal proceedings for restitution of conjugal rights or otherwise howsoever, or take any proceedings against the other of them to obtain a divorce or judicial separation in respect of any past misconduct on the part of the other of

them, but nothing contained in these presents shall in any way prevent either the husband or the wife from taking what legal proceedings they may think advisable to obtain a divorce or judicial separation or otherwise in respect of future misconduct of the other of them."

"The husband shall during the joint lives of himself and the wife, if the wife shall continue to perform and observe the agreements and provisions herein on her part contained, pay to the wife for her separate use without power of anticipation the annual sum of 300*l.* The husband shall keep proper books of account wherein he shall enter all receipts and payments by him in connection with his practice. The said annual sum of 300*l.* shall be paid clear of all deductions except income tax and shall be considered as accruing from day to day but to be paid in advance by equal quarterly payments on the usual quarter-days in every year or within one calendar month thereafter, commencing on the 24th day of June, 1911, notwithstanding the date hereof."

The respondent paid up to the instalment which was due on June 24, 1912. Negotiations took place with a view to reducing the amount, and on October 2, 1912, the respondent filed his petition in bankruptcy. The petitioner proved in the bankruptcy for 500*l.* and eventually received about 250*l.*

The petitioner wrote the following letter to the respondent:—

"8th March 1913.

"Dear William,

"As you know I have had no money from you under the deed since last August when you paid what was due in June. I cannot go on living in this flat without a certain income which the deed was intended to secure. You do not perform your agreement to pay me this income and therefore the deed is useless to me. What am I to do? I have been trying to qualify myself to earn a living for Babs and me but I have not yet had time to do so. For Babs' sake therefore I am willing to forget what has passed and to live with you again if you are willing to live with me. Please let me know as soon as you can, for I shall be very anxious to receive your reply.

"Yours

"Hilda."

1913

McQUIBAN v. McQUIBAN.

The respondent replied with the following:—

"9th March 1913.

"Dear Hilda,

"I cannot entertain your proposal and therefore will not have you back.

"I remain

"Yours truly

"William McQuiban."

On April 5, 1913, the wife filed her petition for restitution of conjugal rights.

Durley Grazebrook, for the petitioner. The deed is no bar to a suit for restitution of conjugal rights. The respondent, by filing his petition in bankruptcy and obtaining his discharge, has put it out of the power of the petitioner to enforce her rights under the deed. [He relied on *Victor* v. *Victor*. (1)]

Cur. adv. vult.

SIR SAMUEL EVANS, PRESIDENT. The petitioner is asking the Court for a decree of restitution of conjugal rights.

The parties entered into a separation deed on December 7, 1911. In this deed there are the usual covenants, including a covenant that neither shall sue for restitution of conjugal rights, and another covenant by the husband to pay to the wife for her separate use, during their joint lives, 300*l*. a year without power of anticipation. There was also the usual clause putting an end to the deed if the parties should return to cohabitation or if the Court should decree a judicial separation or a dissolution of the marriage.

Some time after the date of the deed the husband became bankrupt; and the question is whether the deed precludes the wife from suing for restitution of conjugal rights.

The very foundation of the deed is the obligation to maintain the wife and child, and the essence of the agreement is that the contributions shall be kept up.

It is settled law now by the case of *Victor* v. *Victor* (1) that

(1) [1912] 1 K. B. 247.

1913

McQUIBAN v. McQUIBAN.

The President.

the annual sum payable under the deed can be proved for in bankruptcy, but that no action can be maintained under the covenant to pay. This being so, it is quite clear that the deed cannot be set up in restitution proceedings, as a defence to a petition for restitution.

I pronounce a decree of restitution of conjugal rights with costs; the decree to be obeyed within fourteen days after service.

Solicitors: *Rowe & Maw.*

H. D. G.

ATKINS *v.* ATKINS AND URQUHART.

1913

July 14.

Divorce—Variation of Settlement—No Power of Appointment in Favour of Petitioner's Future Wife and Children of Future Marriage—Interest of Child of Dissolved Marriage.

Where, under a marriage which had been dissolved, no power had been given, by the terms of the marriage settlement, to the innocent party if survivor to appoint a portion of the settled fund in favour of a future spouse and the children by any future marriage, the Court, in varying such a settlement, may, although issue of the dissolved marriage survive, give power to make such an appointment, and in the lifetime of the guilty party, to an extent, having due regard to the facts, not detrimental to the interests of such issue.

THIS was a motion to confirm the registrar's report on petition for variation of settlement.

The facts appear in the report, which was so far as is material as follows :—

"The parties were married on the 18th April, 1908, and there is one child of the marriage, a boy aged three, now in the custody of the petitioner.

"On the 13th May, 1912, the petitioner (husband) obtained a decree nisi on the ground of the adultery of the respondent with the co-respondent.

"Decree absolute followed on the 25th November, 1912.

1913

ATKINS v. ATKINS AND URQUHART.

"On the 8th April, 1908, by ante-nuptial settlement the petitioner settled:—

"(1.) One-fifth of four-sevenths of the funds subject to his parents' marriage settlement.

"(2.) One-seventh of the funds subject to the will of his grandmother, to both of which he was entitled under power of appointment exercised by his father—the latter being subject to a mortgage for 150*l.* to one of the trustees.

"(3.) A policy of insurance in the Scottish Widows' Fund on his own life for 300*l.*

"(4.) Certain furniture mentioned in the schedule.

"The trusts were:—

"(1.) For petitioner for life or till bankruptcy . . .

"(2). After death of petitioner for respondent for life or widowhood.

"(3.) For the children of the marriage born in their joint lives as they or the survivor should appoint.

"(4.) In default of appointment for all the children who should attain twenty-one, or, if females, marry, equally.

"(5.) Power of advancement with consent of both parents or the survivor.

"The respondent brought nothing into settlement.

"The income-bearing funds under the marriage settlement of the petitioner's father amount to rather less than 9000*l.* producing an income of 290*l.* Besides this there are under the said settlement policies on the life of the petitioner's father—one for 1000*l.* in the Atlas Life Insurance Society with bonuses and one for 1000*l.* in the National Mutual Life Assurance Limited with bonuses.

"The funds subject to the trusts of the will of his grandmother consist of 5000*l.* invested on mortgage and produce an income of 200*l.*

"The policy on his own life is still subsisting.

"The furniture is in the possession of the respondent.

"It is submitted that the said settlement be varied as follows:—

"(1.) By extinguishing all interests powers and consents of the respondent with reference to the application or otherwise of the settled funds or any of them as if she were already dead.

"(2.) By inserting a power in the said settlement for the petitioner on any future marriage to settle a life or any less interest in three-fourths of the funds subject to the trusts of the said settlement upon any future wife and to settle any share or shares amounting to three-fourths of the trust funds upon the children of any future marriage but so that the child now living of the present marriage shall never take a less share than he would have taken under a settlement declaring a trust in favour of all the children, not exceeding four, of the petitioner by any marriage in equal shares."

The respondent did not file an answer to the petition for variation of settlement, nor was she represented before the registrar or in Court.

Barnard, K.C. (*S. H. Greville-Smith* with him), for the petitioner, moved to confirm the registrar's report. The petitioner is about twenty-eight and the respondent about twenty-seven. If the marriage had continued in all probability there would have been several other children, which would have affected the present child's share. Apart from this the child's interest has been accelerated by getting rid of the respondent's interests. It would be therefore only fair to insert the suggested clause.

J. R. Brooke, for the infant child of the marriage. On the whole it appears that the child will be in a better position than he was before, and therefore on his behalf the application is supported.

Frampton, for the trustees.

SIR SAMUEL EVANS, PRESIDENT, confirmed the report.

Solicitor for all parties represented on the motion: *F. C. Greville-Smith.*

H. D. G.

C. A,
1913
April 5.

[IN THE COURT OF APPEAL.]

THE OLYMPIC AND H.M.S. HAWKE.

[1911 O. 1166.]

Admiralty — Ship — Collision—Overtaking and Overtaken Vessels—Crossing Vessels—Suction or Interaction—"Swerve"—Regulations for Preventing Collisions at Sea, arts. 19, 21, 24—*Admission of Further Evidence.*

A large Atlantic liner outward bound from Southampton, when about to round the West Bramble Buoy, gave two short blasts of the whistle to indicate to one of His Majesty's cruisers, coming up the Solent, that she was starboarding in order to proceed by the eastern passage through the buoyed channel towards Spithead. The cruiser was, at the time, slightly on the starboard bow of the liner, over a mile distant, and, under port helm, was proceeding to round Egypt Point in the Isle of Wight in order to get into the same channel. Both vessels straightened on their courses, the liner S. 59° E., the cruiser S. 74° E., that is, on converging courses of 15 degrees, involving risk of collision, the liner having the cruiser on her starboard side. A few minutes later, when the vessels, practically parallel, were in shallow water, and distant some hundred yards from one another, the cruiser, through suction or interaction, or other uncontrollable cause, suddenly swerved towards the liner and a collision occurred.

On consideration of the courses of the two vessels, their speeds, their bearings, their distances, their helm actions, and especially the spot of collision, the Court below, in cross-actions of damage by collision, found that the cruiser was not, as alleged by the liner, an overtaking vessel bound, under the King's Regulations, equivalent to art. 24 of the regulations for preventing collisions at sea, to keep out of the way; and that the pilot compulsorily in charge of the liner had made too wide a sweep to the southward and was alone to blame for not keeping out of the way of the cruiser under the crossing rule (art. 19) of the same regulations.

The Court of Appeal subsequently gave leave to the owners of the liner to call evidence before an examiner, as to the finding of the forefoot of the cruiser and other wreckage, with a view to shewing that the collision did not take place at the spot fixed upon in the Court below, and, therefore, that the calculations based upon it, as to the relative positions of the two vessels, at the material time, were inaccurate:—

Held by the Court of Appeal (Vaughan Williams L.J., Kennedy L.J., and Lord Parker), that the appeal of the owners of the liner, and that of the Admiralty, must be dismissed, for though the finding of the wreckage tended to shew that the spot of collision, fixed upon by the Court below, was not quite accurate, this did not materially affect the correctness of the conclusions arrived at.

Per Vaughan Williams L.J.: The evidence as to the finding of the wreckage was admitted by the Court of Appeal on the ground that it was relevant and material to the decision of the action by the owners

of the liner against the commander of the cruiser, and also because the Court was satisfied that the search for the wreckage was not postponed by the owners of the liner taking their chance of winning their case independently of any search for wreckage; but, in the result, the place where the wreckage was found could only be taken as approximately indicating the spot of the collision, because the Court was not satisfied that the forefoot of the cruiser was detached and fell off immediately on the happening of the collision.

Per Kennedy L.J.: In special circumstances, illustrated in the case of a winding river by *The Velocity* (1869) L. R. 3 P. C. 44, although two steam vessels, in a buoyed channel, are visibly approaching one another on converging courses, the rules of good seamanship, and not art. 19, may be held to regulate their respective duties towards each other, but this point, taken on behalf of the owners of the liner, did not apply in the circumstances of the present case, as the pilot of the liner could and should have obeyed the crossing rule.

Per Lord Parker: Witnesses were called on behalf of the cruiser to shew that the behaviour of the cruiser in coming round to port against a port helm might be accounted for by what was referred to as suction, but may possibly be better described as the interaction of two vessels moving through comparatively shallow water at great velocity and in close proximity. That there may at times be such interaction has already been recognized in admiralty cases; but the laws which govern it have been hitherto imperfectly investigated and are comparatively unknown.

APPEAL by plaintiffs, the Oceanic Steam Navigation Company, Limited, owners of the steamship *Olympic*, against a decision of Sir Samuel Evans, President, dismissing their action of damage in which the commander of H.M.S. *Hawke* was defendant, and Cross-appeal by the Commissioners for executing the Office of Lord High Admiral of the United Kingdom against the owners of the *Olympic*.

The proceedings arose out of a collision which occurred, on September 20, 1911, in Cowes Roads, Isle of Wight, between the White Star liner *Olympic* and H.M.S. *Hawke*, and the case is reported on the question whether, in the circumstances of the vessels being in a buoyed channel, art. 19 (1) of the regulations for preventing collisions at sea applied.

The facts of the case (apart from the evidence of the subsequent finding of the forefoot of the *Hawke* and other wreckage),

(1) Art. 19: "When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

C. A. 1913

THE OLYMPIC AND H.M.S. HAWKE.

and the arguments of counsel in the Court below, are exhaustively reviewed in the following judgment, delivered December 19, 1911, by—

THE PRESIDENT (SIR SAMUEL EVANS). These two actions relate to a collision which took place between the steamship *Olympic* and H.M.S. *Hawke* on September 20, 1911, off Cowes, Isle of Wight.

The first action was brought by the steamship *Olympic* against Commander F. Blunt, of H.M.S. *Hawke*. The second was brought by the Commissioners for executing the Office of Lord High Admiral of the United Kingdom against the owners of the steamship *Olympic*.

The first action was brought against the commander because no action lies against the Admiralty Commissioners, but in substance the plaintiffs in the one were in the position of the defendants in the other, and vice versa.

The two actions were tried together, and involved identically the same questions with reference to the cause of the collision. They were tried together by consent. The case for the *Olympic* was opened first.

The collision took place on a fine day, not long after midday, in an open channel. The situation was free, and was not complicated by the presence, or navigation, of any other vessels. One of the colliding vessels was the largest and finest product of the shipbuilding enterprise and skill of the first maritime nation of the world; the other was one of the protected cruisers of her navy. The contemplation of the calamity, and of the damage which resulted from it, cannot but produce a feeling of regret, and even a sense of pain.

It ought not to have happened, but it did happen, and I have, to the best of my ability, to decide upon the evidence how and why it happened, and who are, or is, to be blamed for it, according to the law of admiralty.

The *Olympic* is a triple screw steamship, of 45,000 tons gross and 24,000 tons net register, of 882½ feet in length, of 92½ feet beam, fitted with turbine and reciprocating engines, with a combined power equal to 59,000 horse power indicated, and

1911

THE OLYMPIC AND H.M.S. HAWKE.

The President.

manned by a crew of 885 hands all told. Her draught at the material time was 33 ft. 6 in. forward and 34 ft. aft. Her displacement at a mean draught of 33 ft. 6 in. in sea water is 50,500 tons, and at 34 ft. 51,340 tons. She is a veritable Leviathan that "maketh the deep to boil like a pot." (1)

H.M.S. *Hawke* is a twin-screw first class protected cruiser of 360 ft. length, of 60 ft. beam, with an indicated horse power of 10,000 indicated with natural draught and 12,000 with forced draught. At the material time she was drawing 22 ft. 4 in. forward, and 24 ft. 6 in. aft. Her displacement was approximately 7600 tons.

The bridge of the *Olympic* was 190 ft. abaft her stem; that of the *Hawke* was 91 ft. abaft hers; so that in proportion to the lengths of the vessels the position of the bridge on each was approximately the same.

The *Olympic* was proceeding from Southampton Water towards Spithead through the channel south of the Ryde Middle Bank on her fourth voyage across the Atlantic. The *Hawke* was proceeding from the Solent towards the Nab lightship through the same channel in the course of making her annual power trials. In these trials a certain power of the engines is developed for a certain period, for the purpose of not only testing the engines, but of testing the engine-room complement and their capacity and power for keeping steam. The trials had no concern with speeds; but speeds were taken for navigation purposes.

The vessels sighted each other between three and four miles distant. At that time the *Olympic* was coming down in the Thorn Channel—which is a deep-dredged channel—near the North Thorn Buoy, and the *Hawke* was going up the Solent in the vicinity of the Gurnard Ledge Buoy. Each had the other more or less on her port bow at that time.

They both proceeded on their ways, and about four minutes later the *Olympic* blew two short blasts expressly for the *Hawke*, in order to let the *Hawke* know that she was on the starboard helm, and bound for the eastern passage through the channel towards Spithead. This signal was blown when the *Olympic* was about two-thirds of the way between the Thorn Knoll Buoy

(1) Job xli. 31.

1911

THE OLYMPIC AND H.M.S. HAWKE.

The President.

and the West Bramble Buoy; and thereupon the *Olympic* began to take her turn round the West Bramble Buoy to get into the channel. The distance between the vessels was from a mile to a mile and a half when the signal was sounded.

The cruiser at this time was getting near Egypt Point (Isle of Wight) and had the *Olympic* broader on her port bow. In turning, the *Olympic's* starboard bow was exhibited to the port bow of the *Hawke*. As the *Olympic* was turning on starboard helm to round the West Bramble Buoy to get into the channel, the *Hawke* was turning on port helm to round Egypt Point to get into the same channel.

It was said for each vessel that after her turn was completed, she straightened on a definite course, which was kept practically until the throes of the collision. What these courses were will be discussed and decided later. The distance from the place where the commander of the *Olympic* said she was steadied on her course and the spot where he marked the collision was a little under 9 cables, namely, 1770 yards.

The distance from the place where the commander of the *Hawke* said the cruiser was steadied on her course to the spot where he marked the collision was 11 cables, or 2200 yards.

Although the respective positions, courses, and speeds of the two vessels at earlier stages have to be looked at for some purposes, it is mainly, if not entirely, upon their respective positions, courses, and speeds at and from the time when they straightened on the final courses that the decision of these actions depends.

It will be convenient now to state what the case was which was put forward on behalf of each vessel. It can be done quite briefly.

The case for the *Olympic* was that the *Hawke* was, at all material times, the overtaking vessel, and that as such the duty lay upon her to keep out of the way of the *Olympic* as the overtaken vessel, under the article of the King's Regulations which corresponds with art. 24 of the regulations for preventing collisions at sea, and that she committed a breach of that duty.

The case for the *Hawke* was that, at all material times, the two vessels were crossing vessels within the meaning of art. 19 of the last-named regulations, and the corresponding article of

1911

THE OLYMPIC AND H.M.S. HAWKE.

The President.

the King's Regulations, and that as the *Olympic* had the *Hawke* on her own starboard side, the duty lay upon her to keep out of the way of the *Hawke*, and that she (the *Olympic*) committed a breach of that duty.

Whichever vessel had to keep out of the way of the other, there was a corresponding duty upon that other under the regulations to keep her course and speed.

These were the main contentions, and to these the mass of the evidence and the arguments were directed. There are other matters which arise, and must be dealt with, namely, the allegation that at the last moment action ought to have been taken by the one ship or the other to avert the collision, even though the initial blame was on the other; and also the defence of compulsory pilotage, and the counter allegation that if the fault lay with the *Olympic*, her compulsory pilot was not solely to blame.

I now propose to deal with the main issue. Was the *Hawke* the overtaking vessel, and the *Olympic* the overtaken vessel, or were they crossing vessels?

In order to determine this issue, it is necessary to look at the whole of the evidence, and especially to come to a conclusion as to the spot of the collision, the courses of the vessels, their speeds, their bearings, their distances, and their helm actions at the material times.

An overtaking vessel is defined as one "coming up with another vessel from any direction more than two points abaft her beam, i.e., in such a position, with reference to the vessel which she is overtaking, that at night she would be unable to see either of that vessel's side lights." Crossing vessels are vessels travelling upon converging courses so as to involve risk of collision.

The *Olympic* set out to prove a story which may briefly but with substantial accuracy be stated as follows: That after passing the North Thorn Buoy (where her speed was 17½ knots) she reduced her speed, and that from that point up to just before the collision, the *Hawke* was travelling at a greater speed; that after turning the West Bramble Buoy she straightened on a course of S. 59° E.; that when she steadied on this course, the *Hawke* was at least a quarter of a mile astern, bearing about

1911

THE OLYMPIC AND H.M.S. HAWKE.

The President.

$2\frac{1}{2}$ or 3 points on her starboard quarter; that the *Hawke* was on a parallel course with her for about a mile before the collision, and distant laterally about 300 yards; that from the position astern, the *Hawke* came up to and overtook her, and that when the stem of the *Hawke* was opposite her bridge, she had attained the greater speed and shot ahead, and the *Hawke* fell astern; and finally that the *Hawke* starboarded right into her starboard quarter, and struck her at almost a right angle, about 80 or 90 ft. from her stern.

On the other hand the story of the *Hawke*, stated in a similar way briefly, but with substantial accuracy, was as follows: That she came up the Solent on a course of N. 77° E., and turned round Egypt Point at a distance of about $3\frac{1}{2}$ cables from the land; that by reason of the presence and course of the *Olympic* she steered a course of S. 74° E., intending to pass the three buoys outside Cowes, namely, the West Conical, the Chequers, and the East Conical (also called the Prince Consort) Buoy, at a distance of between 20 and 30 yards on the north side; that her speed was less than that of the *Olympic*, and that she was never overtaking; that the vessels were on converging courses of 15 degrees; that the *Olympic* came within about 100 yards of her, and that in comparatively shallow water by certain forces called suction, or interaction, she was at last, when brought into this close proximity, drawn into the *Olympic* so that she collided at an angle of something between four and five points.

The case depends upon fact, rather than upon law. It is not only an important case, it is also in many respects complicated. But, after full and careful consideration, I have arrived at definite and clear conclusions.

In order to test the evidence, especially the evidence which consists of impressions, opinions, and observations (of greater or less accuracy), it is desirable, and indeed essential, to determine certain matters which ought to be capable of fairly correct ascertainment.

In the first place, if the spot of the collision can be fixed, we have one of the chief determining factors of distances, of courses, and of bearings.

1911

THE OLYMPIC AND H.M.S. HAWKE.

The President.

In the next place, if the speeds of the vessels can be ascertained, or even approximately ascertained, a useful test is provided for bearings, courses, and distances.

The place of collision was in dispute. It was regarded, and properly regarded, by both parties as a very important matter. It was only vaguely stated in the preliminary acts and pleadings. In the interlocutory stage of the proceedings, about a fortnight before the trial, I made an order that each party should mark upon a chart, as particulars in the actions, the place of collision as alleged, and I ordered that the charts so marked should be exchanged at the same time, so that neither party should know beforehand where the place would be fixed by the opponent. The places were marked, and the marked charts were exchanged accordingly.

The spot fixed by the *Olympic* was about 220 yards to the N.N.E. of that fixed by the *Hawke*. These two spots I call "the *Olympic's* place of collision" and "the *Hawke's* place of collision" respectively, and, according to the ordinary rules of practice in legal proceedings, each party ought to be bound, as by particulars, to the places so marked.

At the trial three of the chief witnesses for the *Olympic* were required to, and did, state and mark the place where they said the collision occurred. They were the master of the *Olympic*, the pilot, and Colonel Sexton White. Neither of them agreed with "the *Olympic's* place of collision." Nor did any one of them agree with either of the others as to the spot. The master of the *Olympic* marked a spot about 260 yards to the N.W. of the *Olympic's* place of collision, the pilot a spot about 420 yards to the N.W., and Colonel White a spot about 650 yards to the S.E.

The *Hawke's* place of collision was deposed to by Lieutenant Aylen, the navigating officer of the *Hawke*, and by Commander Blunt.

It was fixed by reference to a position taken a few minutes after the collision, when the *Hawke* came to rest, by Lieutenant Aylen by the direction of Commander Blunt. This position was taken by means of two sets of cross bearings, and was logged by Lieutenant Aylen at the time. By a mistake it was logged as the place where the "ship was struck." Lieutenant Aylen said

1911

THE OLYMPIC AND H.M.S. HAWKE.

The President.

he made the entry "ship struck" in the hurry and excitement of the moment; but that that position was really that in which the ship came to rest. I believe this statement. I also believe that the spot to the southward and westward which was marked as the *Hawke's* place of collision was, as nearly as can be ascertained, the actual spot of the collision.

The *Olympic's* witnesses did not fix their places of collision with reference to any accurate bearings. Their positions were only given as the result of general impression, and as stated they all varied, and varied considerably.

I accordingly decide for the purposes of this case that the *Hawke's* place of collision is where it must be taken to have actually occurred. I now state by comparison, and for reference, the distances from the various spots of collision, spoken to by the three before-named witnesses for the *Olympic*, to what I have decided was the actual place of collision. The master of the *Olympic* gives his, 400 yards away in a direction N. by W. The pilot gives his, 540 yards away about N.N.W. Colonel White gives his, 650 yards away about E.S.E.

The place of collision will be very important, as I afterwards point out, in deciding as to the courses of the two vessels and the lines of those courses in the channel.

Now as to speeds. The maximum speed of the *Olympic* in the open sea is about 22½ or 23 knots an hour. The maximum "reduced speed"—i.e., in channels like the Solent—is about 20 knots. Half reduced speed is about 15 knots. In getting up to North Thorn Buoy the *Olympic* was going through the water at 17 or 17½ knots. She slowed to make the turn round the West Bramble Buoy, until her speed at the end of the turn and when she steadied on her course was said to be 11 or 12 knots; whether it was as low as this is doubtful. All engines were then put full speed ahead, and it was pleaded and stated in evidence at the time of the collision that her speed through the water was 16 knots. Her master said that from about 12 knots it would take her three or four minutes to attain her maximum reduced speed of 20 knots. Professor Byles by his calculations supported that statement. This evidence is in my opinion more reliable than that from the engine-room upon this

1911

THE OLYMPIC AND H.M.S. HAWKE.

The President.

matter. According to her recorded times she straightened on her course at 12.43 P.M. and the collision happened at 12.46 P.M. This means a minimum of three minutes; and a maximum of four minutes, because the times taken were from electric clocks which (with the exception of the master clock) jumped a minute at a time, and did not record anything between the minutes. In this interval I think she must have reached a speed nearer 20 knots than 16 knots.

This question of her speed between the time she straightened on her course and her colliding can be tested or checked in various ways. The distance from the North Thorn Buoy to the *Olympic's* place of collision, as she went, is $2\frac{1}{2}$ knots. According to the log the time in which this distance was covered is nine minutes; this gives an average speed of 16·6 knots—and it includes the lower speed in rounding the buoys. If a mean time of $9\frac{1}{2}$ minutes is taken, the average speed would be 15·8 knots; and if a full ten minutes is taken the average would be 15 knots. The distance to the actual place of collision is greater, and the average speeds would accordingly be somewhat higher in each case. From the Thorn Knoll Buoy to the *Olympic's* place of collision the distance is about $19\frac{1}{2}$ cables. The time given in the *Olympic's* log for travelling this distance is six minutes—that gives an average speed of $19\frac{1}{2}$ knots an hour. At the mean of $6\frac{1}{2}$ minutes, the average speed would be 17·3 knots an hour, and at the full eight minutes, the average would be 16·7 knots an hour. Again, the distance to the actual place of collision is greater, and the average speeds in the three instances would be higher accordingly.

Similar calculations for one more distance will suffice, namely, that between the position in which the *Olympic* straightened on her course after the turn, as fixed by her master, and the actual place of collision. This measures one knot. The time recorded in her log for this distance is three minutes. This gives an average speed of 20 knots an hour. If the mean is taken as before as between three and four minutes, the average speed is over 17 knots an hour, and taking the full four minutes there is an average speed of 15 knots.

The conclusion to which I have come is that the speed of

1911

THE OLYMPIC AND H.M.S. HAWKE.

The President.

the *Olympic* at the time of the collision, and for a few minutes preceding it, was greater than that stated by her witnesses.

The speed of the *Hawke* can be fixed with more certainty. The cruiser was, as stated, on power trials. Commander Blunt and others gave evidence that her speed was 15¼ knots at and for some time before the accident.

Between 7.30 and 11.30 A.M. she had been engaged in making trials of her full natural draught power (which is equal to four-fifths of the forced draught power) and from 11.30 up to the accident in making trials of her three-fifths natural draught power. For the former trials the number of revolutions made was 92 per minute. If the bottom of the cruiser had been clean, the speed on that number of revolutions would have been 18·4 knots: five revolutions per minute being equal to a knot per hour. But she had not been in dock for a year, and her bottom was in a state which impeded her designed speed, and the results obtained were an average of only 17 knots an hour. For the three-fifths trials from 11.30 o'clock the number of revolutions was eased down to and kept at 82. This was proved by the engine-room log and by several witnesses. If the bottom of the ship had been clean this would have given a speed of 16·4 knots, but in the state in which she was, she would fall short of this, and in proportion as before her speed would be only a little over 15 knots.

This, I find upon the evidence, was about the speed of the *Hawke* for some time before, and at the time of, the collision.

I now come to the consideration of the important matters of the courses and bearings of the two vessels.

First, with regard to the courses of the *Olympic*. They are not in any uncertainty. When she first sighted the cruiser she was on a course of S. 65° W. magnetic, and this course was continued till she starboarded for rounding the West Bramble Buoy. When she gave the two-blast signal for this helm action, she had the cruiser on her starboard bow. After she finished the turn she steadied on her new course, which was S. 59° E. This course had previously been entered in her log as follows: "West Bramble to Peel Buoy, S. 59° E."

She remained on it until immediately before the blow, when

1911

THE OLYMPIC AND H.M.S. HAWKE.

The President.

her helm was put hard-aport, which altered her heading about a point.

There is no doubt about this course of S. 59° E. The position of the vessel in the channel depended, of course, upon the place where she was when the course was set. About this there was considerable dispute. The *Olympic's* witnesses placed her much more to the north of the channel than those for the *Hawke* did. This question and the other connected with it, namely, the position of the *Hawke* in the same channel when she got on her last course before the accident, is all-important and requires careful investigation. This will be done a little later.

Next as to the courses of the *Hawke*.

When she first sighted the *Olympic* her course was N. 77½° E. magnetic. The commander said that, by reason of the presence of the *Olympic*, he turned Egypt Point, and put his vessel on a course of S. 74° E. Counsel for the *Olympic* contended that this course was never set, and the *Hawke* was never upon it. Commander Blunt said he took this S. 74° E. course from the line of three buoys off Cowes which he could see in front of him, namely, the West Conical, the Chequers, and the East Conical, and steered more especially by the Chequers, which was the outlying one, to pass clear, but as close to them as he could; and that following that course he passed about 20 yards off the Chequers, and about 30 yards off the others. There was another cruiser called the *Edgar* lying ahead anchored in Stokes Bay; and the man at the wheel was told to steady on the *Edgar*. Where a fixed object lies in or quite near a course, the helmsman is often in practice told to steady on such an object, not so much to steer for it as to have ready assistance to keep the ship's head steady.

The position where the *Edgar* was anchored was proved; and the bearing of the *Edgar* from the *Hawke* when the latter was off the Chequers Buoy was S. 73° E., which confirms the course said to have been set. Commander Blunt said he was absolutely certain about the course. His evidence was also that the *Olympic* was still on her turn when he steadied on the S. 74° E. Lieutenant Aylen testified to seeing that the course was S. 74° E. on the standard compass after the commander steadied her, and

1911

THE OLYMPIC AND H.M.S. HAWKE.

The President.

to hearing afterwards the order to the helmsman to steady on the *Edgar*, or steer for the *Edgar*. Lieutenant Bashford heard the order to steady on the *Edgar*—and saw that the vessel was in fact so steadied. Hunt, a quartermaster on the bridge, said he saw the *Hawke* steadied on S. 75° E.—this was by his steering compass—and heard the order, "Steady on the *Edgar*," and that he himself took the wheel by Lieutenant Bashford's direction and steadied the ship on the *Edgar*. So much for the evidence from the *Hawke* upon the question of this course.

How does the evidence from the *Olympic* fit in with this? The pilot in charge said that when the cruiser was about a quarter of a mile away on his starboard quarter, he saw that she had altered from her original course, i.e., N. 77° E., and had got on No. 2 course. To quote his own words, "She was on No. 2 course then. I will call it E. by S." That is S. 78¾° E.—converging more upon S. 59° E., by 4¾°, than S. 74° E. would be. Later he said that at that time she was heading towards him converging 1¼ points, which would be S. 75° E., and ultimately he stated in terms that the cruiser might have been heading upon a course of S. 74° E. His case upon this was that she afterwards ported and came on a parallel course with the *Olympic*. Upon the evidence for the *Hawke* and upon this testimony from the *Olympic's* pilot, I find that after turning Egypt Point the *Hawke* was steadied on a course of S. 74° E.

We have now arrived at this: that after the two vessels were steadied upon the completion of the turnings, their courses were S. 59° E. and S. 74° E. respectively. They were, therefore, converging at an angle of 15 degrees, and if their courses were pursued, risk of collision was involved.

I stated before that the positions in the channel of the two lines of these courses were important and required careful investigation. They determine not only the respective parts of the channel to which each vessel got; but also in large measure the disputed point as to whether the *Hawke* subsequently ported herself into a parallel course.

The cases of the two vessels are contradictory. The *Olympic* alleged that the *Hawke* came much further north into the channel than a turn round Egypt Point required or fitted. The

1911

THE OLYMPIC AND H.M.S. HAWKE.

The President.

master of the *Olympic* brought the *Hawke* up to a position (which he marked on a chart) about 6 cables and 130 yards north of Egypt Point; and the pilot brought her up about 8 cables and 160 yards to N.N.E. of the Point. The allegation of the *Hawke* was that she rounded Egypt Point about 3½ cables off.

The *Olympic's* evidence was directed to prove that she was in a good mid-channel course when she steadied on S. 59° E., because she so steadied with No Man's Fort open on her starboard bow, 1, 2, or 3 degrees. The course recorded in the log was, as I have said, "West Bramble Point to Peel Buoy, S. 59° E." No Man's Fort was distant about 8½ miles; Peel Buoy was 3½ miles. Her course would have to be changed at the Peel Buoy, and at various other points long before reaching No Man's Fort. It could not be reached on that course. The vessel would have been on the banks before long.

It might have been that the helmsman was told to keep an eye on that well-known distant fixed object so as to help him to keep the head of his huge craft steady, but the helmsman Haine's story about this was very extraordinary. He did not mention No Man's Fort in his examination-in-chief, when he said what course he steered. In cross-examination he said: "When I got the order to steady, there was just the No Man's Fort on the starboard bow, 2 points." He insisted over and over again that the fort was "2 points" or "22 degrees" on the starboard bow. That, of course, was impossible, but such was the state of his mind upon it when his evidence was given.

I cannot accept the story that the course was fixed and kept upon a line shewing No Man's Fort a little (up to 3 degrees) on the starboard bow. A few degrees at such a distance would make all the difference. A line with the fort 2 degrees on the starboard bow would bring the vessel quite close up to the Ryde Middle Shoal, and 3 degrees or more right on the shoal. Therefore, the exact line of the *Olympic's* course in the channel cannot properly be determined by considering angles between her and the fort.

The evidence from the cruiser was led to establish that she passed within 3½ cables of Egypt Point, and that her S. 74° E. course from there kept her on the extreme starboard side of the

1911

THE OLYMPIC AND H.M.S. HAWKE.

The President.

channel, and brought her as close as she could get to the three buoys already referred to.

All the officers who were called from the *Hawke* testified to this. Lieutenant Aylen observed the position at three places, at Solent Bank Buoy, Gurnard Ledge Buoy, and Egypt Point. He entered these, with the times, in a note-book, which, unfortunately, was lost overboard at the shock of the blow between the vessels when he stood in the chains on the side which struck. Lieutenant Aylen's honesty and integrity were not impeached. His evidence must, in the absence of the lost book, be considered as that of any other witness. If he is right in his recollection, he establishes the line of the N. 77° E. course as being about a cable inside the line of S. 77° W., which was, and is, marked on what was called the impounded chart, and which I marked "F," and proves that Egypt Point was passed about 3½ cables off. If the course was set, as I have found it was after the turn, and if it was set at about this distance off the point fixed by Lieutenant Aylen and others, and if it was followed up to and close along the line of the three buoys, then one is not surprised to hear, and one is naturally prepared to accept the evidence, that Commander Blunt remarked to the navigator that the *Olympic* was coming unpleasantly close, and asked him when just past the Chequers Buoy whether he could haul any more to starboard, and that the reply given was, "Not till you are past the Red Buoy," meaning the East Conical Buoy, and that as soon as he could see the Old Castle Point Buoy clear of the Red Buoy, he gave the order to port which he said he gave.

Again, what is the evidence from the *Olympic* upon this? As to the position of the *Hawke* in coming up the Solent the pilot gave evidence. He said that when he blew the two-blast starboard helm signal to let the *Hawke* know that he was rounding the West Bramble, she was 1½ miles away from him right in mid-channel, abreast of Gurnard Bay, coming up on a mid-channel course of N. 77° E., and as near to East Lepe Buoy as she was to the Gurnard Ledge Buoy. Now the distance between these two buoys is 6 cables. But if a line is drawn on a course of N. 77° E. from the spot where the pilot marked the *Hawke* when the *Olympic* steadied on her last course (even supposing

1911

THE OLYMPIC AND H.M.S. HAWKE.

The President.

that the *Hawke* had not before changed to a southward and eastward course) past the East Lepe Buoy, it would pass Egypt Point rather over 6½ cables away, but it would go within 30 or 40 yards of East Lepe Buoy and over 5½ cables away from the Gurnard Ledge Buoy. It would also go over the Solent Bank. The same can be said within 70 or 80 yards of a similar line drawn from the corresponding spot marked by the master of the *Olympic*. The evidence of the pilot on this point is nearer the truth than his marking on the chart, and is more consistent with that of Lieutenant Aylen as to the distance from the land of the *Hawke's* up-channel Solent course. Reference may also be made to the evidence of Mr. Lashmar, the master of the yacht *Belinda*. He described where his yacht was off Cowes, and said he saw the *Hawke* turn Egypt Point; he said he could see without any difficulty at what distance from the land the *Hawke* made the turn, and he gave the distance as 300 yards only.

For these reasons, amongst others, I find that the line of the S. 59° E. course of the *Olympic* was much further south than her witnesses stated; and that the line of the S. 74° E. course of the *Hawke* was substantially where it was stated to be by Commander Blunt and Lieutenant Aylen.

This conclusion is consistent with what I have found to be the true place of the collision. The explanation of the *Olympic* coming so far south is, I think, that the pilot with this huge vessel made too large and sweeping a turn round the Brambles. What tide there was—half a knot to a knot—would also tend to set her to the south.

Now I must deal with the question of whether the *Hawke* was at any time the overtaking ship, and whether she is to be regarded as the overtaking ship at the time of the collision. Was she at any time coming up with the *Olympic* from a direction more than 2 points abaft her beam? In the course of the final address I asked counsel for the *Olympic* at what time the vessels ceased to be crossing vessels, if they ever were crossing vessels; and at what time they became overtaking and overtaken vessels. The reply was that that raised a point which had to be considered with great care, that they were not sure of the exact answer they were going to give at the moment, as they had not

1911

THE OLYMPIC AND H.M.S. HAWKE.

The President.

considered it. But I assume, from the way the evidence was placed before the Court, that the *Olympic's* contention is that at any rate from the time when she was steadied on her S. 59° E. course the *Hawke* was the overtaking vessel and ought to have kept out of her way. Many witnesses deposed that at this time the *Hawke* was 2½ to 3 points on her starboard quarter and distant a quarter of a mile or more. They placed the *Hawke* therefore 5 to 5½ points abaft the beam of the *Olympic*, and said she was much the faster vessel until the *Olympic* came to pass the *Hawke* just before the accident. There was an extraordinary similarity, amounting almost to complete identity, about their evidence. Much reliance was placed upon it by counsel for the *Olympic*, and especially upon the testimony of Colonel Sexton White. This gentleman was a man who had experience of steam trials and who was pretty familiar with ships. He placed the *Hawke* at about a quarter of a mile (400 to 500 yards) away from the *Olympic* and on her starboard quarter. He had no practical knowledge of "points" of the sailor's compass; but when asked to shew by models the relative positions of the two vessels, he placed the *Hawke* about 5½ points abaft the beam, on the starboard quarter of the *Olympic*. This body of evidence, if it could be relied upon as being the result of accurate and nautically intelligent observation, would be very important. But general observation as to the distances, bearings and speeds of two vessels turning at different points, at a considerable distance away, about the same time, and then angling towards each other is difficult and liable to great errors. Evidence of that kind requires to be submitted to a careful test; and tests are available in this case. None of the observers at the time were thinking of any collision, and none of them made observations with reference to any fixed objects on the land or otherwise. They may have made mistakes, and harboured inaccurate impressions. Even Colonel White, who was perhaps the most trained and intelligent of the witnesses, was clearly mistaken as to the place of collision, and of the place where he described the *Hawke* to be when he said she starboarded into the *Olympic* just before striking her. Of such places he would be likely to take note, and indeed he noted them in this instance by reference to a fixed object on the land close by. He said that

1911

THE OLYMPIC AND H.M.S. HAWKE.

The President.

when the *Hawke* starboarded she was rather to the eastward of Old Castle Point, and that the *Olympic* had got abeam of Old Castle Point at that time. But the place of collision was in a direction not eastward but N.N.W. from this Point, and on her course the *Olympic* would not have been abeam of the Point for another 750 yards beyond where she collided; or, to test the value of such observations in another way, she would not have been abeam of the Point for another half a mile beyond where the master of the *Olympic* said she collided. Other observations by the same body of witnesses produced upon them the impression apparently that the vessels were for a long time upon parallel courses, brought on to the parallel, according to the pilot, by the *Hawke* porting from her S. 74° E. course.

The evidence, as has already been pointed out, established that the vessels were never brought on parallel courses at all. There are still safer tests of the accuracy of such observations, or impressions, which shew that they are not reliable. It is capable of mathematical demonstration that if the ships were on converging courses of 15 degrees (which it has been shewn they were) and the *Hawke* was a quarter of a mile away, and $5\frac{1}{2}$ points abaft the beam of the *Olympic* (as most of the witnesses say), the *Hawke* would have to travel just about twice as fast as the *Olympic* in order to meet her at the point of intersection. I have found the speed of the *Hawke* to be 15 or $15\frac{1}{4}$ knots, on evidence which appears to me to be unanswerable; accordingly the *Olympic* would only travel from where she straightened on her course to the point of intersection at $7\frac{1}{2}$ knots or so, which is absurd.

Similarly, with the *Hawke* at 5 points abaft the beam, the ratio of her speed to the *Olympic* would be as 11 to 6; that would give a speed to the *Olympic* to the point of intersection of about $8\frac{1}{2}$ knots, which again is absurd.

Apply one other test. The distance between where the master of the *Olympic* marked the *Hawke* on the chart, $5\frac{1}{2}$ points abaft the beam, when his vessel steadied on her course to the place of collision is 1 mile and 3 cables. (The distance is the same to the place which the particulars chart delivered by the *Olympic* fixed for the collision.) According to the logged time of the

1911

THE OLYMPIC AND H.M.S. HAWKE.

The President.

Olympic, the *Hawke* travelled this distance in three minutes; to do that would require a speed of 26 knots upon the *Hawke*.

If a mean time of three and a half minutes is taken, her speed would have to be over 22¼ knots.

And even if four minutes (which is outside the maximum) are given, her speed would have to be 19½ knots.

These speeds on the *Hawke* are impossible. These tests shew conclusively, in my opinion, that the evidence of the impressions as to distance and bearing given by the witnesses referred to cannot be relied upon. The evidence given by Mr. Lashmar, Mr. Gaudion, and Captain Lee was of much the same character, and is open to the same criticism. Further, with regard to the two last-named witnesses, whose range of vision was limited as marked on the chart, it is to be observed that their evidence is quite consistent with what I have found to be the facts, that they should first see the *Olympic* come into sight, and then the *Hawke*; that the opening between the two should be closing to their vision, and that the *Hawke* being so much nearer should appear to them to be travelling at a faster rate. The comments upon their evidence which counsel for the *Hawke* made, and which they illustrated by a diagram, are fair and sound.

It is upon such evidence of general observation as I have been dealing with that the *Olympic* founded her case that the *Hawke* was an overtaking vessel.

Commander Blunt denied that the *Hawke* ever was two points abaft the beam of the *Olympic*.

I have come to the conclusion that he is right.

The *Hawke* was *not* an overtaking vessel within the meaning of the rule.

If either vessel was, it was the *Olympic*, which overtook the *Hawke*.

I think that in approaching the place where the vessels collided, they were crossing vessels, and, as the *Olympic* had the *Hawke* on her starboard side, she ought to have got out of the way.

From what has already been said about the lines of the courses in the channel, it follows that I cannot accept the version of the *Olympic* that the vessels were laterally apart a distance of

1911

THE OLYMPIC AND H.M.S. HAWKE.

The President.

300 yards when the *Hawke* was said to turn on a starboard helm towards and into the *Olympic*.

According to the turning circles of the *Hawke*, if the vessels had been 300 yards away from each other laterally, she could have passed under the stern of the *Olympic*.

They were more like 100 yards apart when the *Hawke* swerved in.

I am asked to decide that the cruiser starboarded in order to get under the stern of the other vessel.

The case for the *Olympic* was that the *Hawke* executed a manœuvre under a starboard helm in order to do this.

Even if the distance between them was about 300 yards, as alleged, the attempt would, to use the phrase of the master of the *Olympic*, be "an inconceivable manœuvre." The commander, three officers, and two men at the wheel on the *Hawke* all denied positively that any order was given to starboard, or that the helm was starboarded. If the intervening lateral distance was something like 100 or 150 yards, the suggested manœuvre would be still more inconceivable. To find that it was executed I should have to disbelieve these witnesses. About such a matter there could not be a mistake. The only alternative is that they swore falsely, and conspired to swear falsely. I cannot adopt that alternative. It is to be remembered in this regard, and indeed in regard to the whole of their evidence, that the officers of the cruiser gave their testimony at an inquiry which was held the day after the accident. At that time it is quite improbable, if not impossible, that they could have had any knowledge of the case which would be made on behalf of the *Olympic*, as to speeds, bearings, and so forth. It is not unfair in the circumstances to assume that the accounts they gave at this trial were the same as, or consistent with, those to which they testified at the inquiry. They must have known that their superior officers would carefully watch the evidence that they would give.

I now come to the circumstances which occurred immediately before the vessels came into collision.

When the *Hawke* was in a position to clear the East Conical Buoy an order was given to port her helm 5 degrees. This was done in order to give as much room as possible to the

1911

THE OLYMPIC AND H.M.S. HAWKE.

The President.

Olympic. The *Hawke* changed her heading to the south under this helm to the extent of less than a point. Suddenly, however, she swerved in towards the large vessel. Evidence was given by Mr. Taylor, a naval constructor in the United States Navy Department, on the theory of "suction" or interaction between vessels, especially in shallow water—a subject to which he had given much study. Interesting experiments were also made in the presence of the Elder Brethren and myself. They were not very conclusive, especially as to the direction and extent of the forces, but they shewed that disturbing forces were set up. In this case the speeds of the two vessels were high, and the disparity between the displacements of the two vessels was enormous; they were roughly as 7 to 1; and they were in close proximity. Moreover, if the place of collision which I have accepted is substantially the correct one, it happened that just before the swerve the *Hawke* was passing over the shallowest part of a shoal, which would tend to give her a sheer towards deeper water. The *Olympic* was at about the same time passing over a bottom which was irregular and of a comparatively small depth.

I have decided that there was no starboarding by the *Hawke* as contended by the *Olympic*—and I am of opinion that, in the exceptional conditions which prevailed, the forces set up in the water are sufficient to account for the *Hawke* being carried towards the *Olympic* in a swerve which was beyond her control.

The *Olympic* had ample room and water in the channel to the northward. She came much too close to the cruiser on the south side of the channel. She did not take the proper steps to keep out of the way. She might have averted the collision right up to the last if she had put her helm hard-a-starboard. Even when the pilot saw the *Hawke* come towards his vessel, he delayed action; and even when he took it, he ordered the helm hard-aport, which was a very doubtful manœuvre. In the agony of the situation, certain orders were given on the *Hawke*. They did not avail; but they were not wrong. In carrying them out the helm was jammed, but this was an accident for which no one is responsible, and which did not affect the collision.

I cannot find that the *Hawke* is to blame for not acting

1911

THE OLYMPIC AND H.M.S. HAWKE.

The President.

otherwise or earlier, because she had to keep her course and speed until it was clear that the collision could not be averted by the action of the *Olympic* alone; and, as I have said, action on the part of the *Olympic* at almost the last moment might have prevented the accident.

Complaint was made that the *Hawke* failed to give sound signals when rounding Egypt Point on a port helm, and at the last, when the commander ordered "Port 5 degrees" in an attempt to get as far away from the *Olympic* as possible. These signals ought to have been given; but the omission to give them had nothing to do with the collision, and there is no presumption of fault in the case of the King's ship.

On the main issues raised, I therefore find upon the evidence: (1.) That the *Olympic* has failed to establish her contention that the *Hawke* was an overtaking vessel bound to keep out of the way; (2.) that the vessels were crossing vessels, and that the *Olympic*, having the *Hawke* on her starboard side, should have kept out of the way of the *Hawke*; (3.) that the *Hawke* was not to blame for what she did, or omitted to do; and (4.) that the cause of the collision was the faulty navigation of the *Olympic* by her pilot in going dangerously near the *Hawke*, and the non-observance of the rule which required her to keep out of the way.

I am not troubled in this case with the question of whether a breach by the *Olympic* of art. 19 of the sea regulations involves a statutory presumption of fault under s. 419, sub-s. 4, of the Merchant Shipping Act, 1894, because I am of opinion that the breach contributed to the accident. This question may have been decided inferentially in *The Sans Pareil* (1), but upon that, having regard to the decision in *The Hero* (2), under another rule, I do not express any view.

One other matter still remains for decision, namely, whether the owners of the *Olympic* are protected from the results of her faulty navigation by the defence of compulsory pilotage.

It was formally proved by the first witness at the trial that the *Olympic* was in charge of a duly licensed pilot in a compulsory pilotage district; that all the orders preceding the collision

(1) [1900] P. 267. (2) [1911] P. 128; [1912] A. C. 300.

1911

THE OLYMPIC AND H.M.S. HAWKE.

The President.

were given by the pilot; and that all his orders were properly and promptly obeyed. During the rest of the trial this matter was left untouched. It receded into the background, and seemed to have faded out of memory, until counsel for the *Hawke* in answer to their opponents dealt with it. The Elder Brethren and I were carefully watching to see whether it would be suggested to the witnesses for the *Olympic* that any one other than the pilot was to blame. It was put forward in a vague sort of way by counsel for the *Hawke* at the end of the case that the pilot was not solely responsible for the accident: "because he was navigating his ship upon an assumption of facts which did not exist, and he was not kept informed of the real facts." When asked who the persons were other than the pilot whose negligence partly caused the accident, counsel said: "The people, I should say, who were on the bridge, or the look-out man," and an answer of the pilot was referred to in which he said: "Of course, while I was taking the turn, I was certain that I should get round far ahead of her, so while I was making the manœuvre round the West Bramble Buoy I was not paying much attention to her."

Then counsel for the *Hawke* added: "That was all the pilot knew and no more, and if his view as to the place was entirely wrong, then he was not properly informed by the owners' servants as to what the real state of affairs was." No explanation was given as to how the owners' servants, and which of them, could know that the pilot was not paying much attention to the cruiser, which was within his sight, and to which he had signalled; or how they, and which of them, could know that the view of the pilot as to the place of the *Hawke* was wrong. Similarly, counsel for the *Hawke*, to whom I allowed a final reply, said that their case was that neither the man looking out forward nor the man looking out aft gave any information to the pilot, "and the pilot never knew, nobody on the bridge knew, that we were meeting on converging courses." I asked him if he alleged any fault on the part of the master of the *Olympic*; at first he answered: "It may be that the master of the *Olympic* was relying on the look-out man," but afterwards he said that he did allege some default on the part of the master. I then asked

1911

THE OLYMPIC AND H.M.S. HAWKE.

The President.

him: "Did you put any question to him indicating that you were going to blame him so that he might have a chance of explaining?" The answer was: "I do not think there was any question directly put to him in that form, but he tells us what he did, and that was quite sufficient for us, when he told us himself what he did. He has not excused himself from telling the pilot what was going on. The fact was he did not know, he could not tell the pilot; he did not know." And finally they said: "The point is a want of information; the pilot was not kept informed of the real position of the *Hawke*." The pilot was the person who could and ought to have kept himself informed of this.

There is not a particle of evidence that the collison was caused partly by negligence of other persons for whose negligence the owners are liable.

It may be very desirable that the law as to the defence of compulsory pilotage should be altered. I have on previous occasions expressed my views as to that. I may add that the departmental committee appointed to consider the question unanimously recommended the abolition of the owners' immunity.

But it is for the Legislature to make the law. My function is to declare and administer it as it now stands.

The authorities as to the existing law are clear. The collision here was due solely to the faulty navigation of the pilot, and there is not a shadow of foundation for saying that the negligence of any of the owners' servants partly caused it. The owners of the *Olympic* therefore succeed on the defence of compulsory pilotage.

I have now dealt with the whole case.

As it is one of great importance I wish to say expressly that the Elder Brethren, who have given me assistance which I value highly, are in complete accord with all the findings which form the basis of this judgment.

The result is that the action against Commander Blunt fails, and he is entitled to judgment with costs, but only 50 per cent of those common to both actions.

In the other action, although the collision was brought about

1911

THE OLYMPIC AND H.M.S. HAWKE.

by the negligent navigation of the *Olympic*, the pilot is solely responsible for that, and accordingly judgment must be entered for the owners of the *Olympic* upon the defence of compulsory pilotage without costs.

On March 13, 1912, an application was made to the Court of of Appeal (Vaughan Williams L.J., Farwell L.J., and Kennedy L.J.) on behalf of the plaintiffs, the owners of the *Olympic*, under Order LVIII., r. 4, of the Rules of the Supreme Court, for leave to adduce further evidence upon the hearing of the appeal and cross-appeal from the judgment of the President.

The further evidence proposed to be adduced was in respect of the conflict of statements as to the exact spot at which the collision between the steamship *Olympic* and H.M.S. *Hawke* took place. Dragging operations had been carried out, and the forefoot of H.M.S. *Hawke* and other wreckage had been found some distance from the position marked on the chart by the commander of H.M.S. *Hawke* as the place of collision.

The application was opposed on behalf of the Commissioners for executing the Office of Lord High Admiral; but the Court made an order for the evidence to be taken de bene esse, the costs of the application to be paid by the owners of the *Olympic*.

The nature of the evidence so taken, and the grounds for admitting it, are stated in the judgment of Vaughan Williams L.J., and further details are given in the judgment of Kennedy L.J.

The hearing of the appeals commenced on January 21, 1913, and lasted fifteen days; but the cross-appeal by the Admiralty against the decision of the President that the pilot of the *Olympic* was alone to blame was not pressed.

Sir Robert Finlay, K.C., Laing, K.C., D. Stephens, and *H. C. S. Dumas*, for the owners of the steamship *Olympic*.

Sir Rufus Isaacs, A.-G., Aspinall, K.C., Bateson, K.C., and *C. Robertson Dunlop*, for the Admiralty.

The arguments of counsel—on the one hand that the *Hawke* and the *Olympic* were overtaking and overtaken vessels under art. 24 of the regulations for preventing collisions at sea, and,

therefore, the *Hawke* was to blame for not giving way, and, on the other, that they were crossing vessels under art. 19, and, therefore, the *Olympic* was to blame for not giving way—fully appear from the following judgments, in which all the material cases cited by counsel are referred to.

On February 13 judgment was reserved, and on April 5, 1913, the following judgments were read:—

VAUGHAN WILLIAMS L.J. The questions to be decided in this case relate to the collision between H.M.S. *Hawke* and the White Star liner *Olympic*. The President of the Admiralty Division has decided that the *Olympic* was to blame, and has dismissed the action by the *Olympic* against the *Hawke*. Against this judgment the *Olympic* has appealed to this Court.

It is convenient here to mention that the learned judge gave no judgment against the *Olympic* on the claim of the *Hawke* in the action in which she was, through the Admiralty Commissioners, plaintiff, and the owners of the *Olympic* defendants, on the ground that the collision was due solely to the faulty navigation of the pilot, and stated that there was not a shadow of foundation for saying that the negligence of any of the owners' servants partly caused it.

Since the trial before Sir Samuel Evans the forefoot of the *Hawke* has been found at the bottom of the sea, and it has been contended that the place where this portion of the *Hawke* has been found indicates that the place of collision must have been at a point in close proximity to the place where this wreckage was found.

We have admitted the evidence of the finding of the wreckage on the ground that it is relevant and material to the decision of the action by the *Olympic* against the *Hawke*, and also having satisfied ourselves that the search for the wreckage was not postponed by the *Olympic* taking their chance of winning their case independently of any search for wreckage.

On this new evidence we, notwithstanding the cogent evidence of the eminent expert called on behalf of the *Hawke*, have adhered to the natural prima facie conclusion that the place in which the

C. A. 1913

THE OLYMPIC AND H.M.S. HAWKE.

Vaughan Williams L.J.

wreckage was found approximately indicates the position on the sea of the collision. I say approximately because I am by no means satisfied that the forefoot was detached and fell off immediately on the collision.

The fact that the place of the collision is approximately determined by the place of the finding of the wreckage displaces some important inferences of fact on which the President based his judgment.

The judgment of the President on the main issues raised at the trial finds:—

1. That the *Olympic* has failed to establish her contention that the *Hawke* was an overtaking vessel bound to keep out of the way.

2. That the vessels were crossing vessels, and that the *Olympic*, having the *Hawke* on her starboard side, should have kept out of the way of the *Hawke*.

3. That the *Hawke* was not to blame for what she did or omitted to do; and—

4. That the cause of the collision was the faulty navigation of the *Olympic* by her pilot in going dangerously near the *Hawke*, and the non-observance of the rule which required her to keep out of the way.

The President deals first in his reasoned judgment with finding 1, that the *Olympic* has failed to establish her contention that the *Hawke* was an overtaking vessel bound to keep out of the way, and says: "In order to determine this issue it is necessary to look at the whole of the evidence, and especially to come to a conclusion as to the spot of the collision, the courses of the vessels, their speeds, their bearings, their distances, and their helm actions at the material times"; and further says: "An overtaking vessel is defined as one coming up with another vessel from any direction more than two points abaft her beam, i.e., in such a position, with reference to the vessel which she is overtaking, that at night she would be unable to see either of that vessel's side lights. Crossing vessels are vessels travelling upon converging courses so as to involve risk of collision."

I do not think that either side relies upon the reasons given by the President for the conclusion that he has arrived at, because that reason is largely based upon the place of collision

which he relied upon, and this turns out not to be the right place. The case in favour of the *Hawke* not being the overtaking vessel but the leading vessel at the moment of the *Olympic* steadying on her course S. 59° E. is this: that, make the speed of the *Olympic* as slow as one reasonably can, it is impossible, having regard to the speed of the *Hawke* of 15½ knots, which is a speed accepted by counsel for the *Olympic*, for the *Hawke* to have arrived at the wreckage place of collision, even assuming the collision to have taken place at 12.47, and not 12.46, the time according to the log-book of the *Olympic*, unless the *Hawke* travelled at a speed of over 18 knots an hour, and at an even greater speed if one accepts the evidence of the *Olympic* witnesses that the *Hawke*, when the *Olympic* steadied on her course, was 5 to 5½ points abaft the *Olympic's* beam at a quarter of a mile distant. The importance of this evidence as to the *Hawke* being 5 to 5½ points abaft the *Olympic's* beam, to my mind, is that it shews how unreliable the evidence of the *Olympic* witnesses is, unfortunately, in this case. We have got to deal with the case on reasoning based on evidence which I feel is open to some damaging criticism; first, it was not only the witnesses called on behalf of the *Olympic* who arrived at impossible conclusions, as is in substance admitted by the inconsistency of the argumentative chart with the statement of the *Olympic* witnesses, including that of the pilot, but the witnesses for the *Hawke* also arrived at an impossible conclusion as to the proximity of the *Hawke* to the Chequers Buoy.

I think, however, that the simplest way of putting this argument against the *Hawke* being the overtaking vessel is to deal with the relative positions of the *Olympic* and the *Hawke* at the time of the steadying by the *Olympic* on the S. 59° E. course, as the Attorney-General did in his argument. He, dealing really with admitted facts only, shews that the distance which the *Hawke* had to traverse to reach the position of stem to bridge was 300 yards, thus arrived at: Length of *Olympic*, from bridge to stern, 230 yards (692 feet); distance between the stem of the *Hawke* and the stern of the *Olympic* as depicted upon the argumentative chart, 70 yards, which total 300 yards. Then the Attorney-General takes 14·2, the average pace of the *Olympic*

C. A. 1913

THE OLYMPIC AND H.M.S. HAWKE.

Vaughan Williams L.J.

in the last lap, i.e., between the spot where the *Olympic* steadied and the spot where the swerve of the *Hawke* began, as shewn on the argumentative chart, which is three cables behind the point of impact, which is taken as the point where the wreckage was found.

The result is that the *Hawke*, in order to gain these 300 yards on the *Olympic*, would have to travel at a speed of 3 to 3½ knots faster than the *Olympic*—that is about 17½ knots per hour, which is impossible.

This appears to me to be a simpler way of testing the case for the *Olympic* than by commencing calculations at the Thorn Knoll, where the vessels first sighted each other, for such calculations depend largely on estimates incapable of proof, and not on agreed estimates. Moreover, it may be pointed out against the *Olympic* that if you adopt the evidence of her witnesses as distinguished from the argumentative chart and assume that the *Hawke* was 3 points abaft the *Olympic's* beam and a quarter of a mile away, and still more if she was 5 to 5½ points abaft the *Olympic's* beam, it would have been still more patent that the collision could not have occurred unless you assume that the *Hawke* travelled at what for her must be an impossible speed.

The second point decided by the President was that the two vessels were crossing vessels and that the *Olympic* having the *Hawke* on her starboard side should have kept out of the way of the *Hawke*. It really is not denied that at the material time, that is, at the time when the two vessels were both steadied on their courses, that is, the direction in which they proposed to travel, those two courses would intersect, but it is said that they were not crossing vessels within art. 19, "When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other," because it is said that there was no risk of collision. I see no reason why we should hold that there was no risk of collision between these two vessels, which admittedly were approaching each other at an angle of 15 degrees. Our assessors advise us that "the *Hawke* was a steam vessel crossing so as to involve risk of collision," but add that "those in charge of the *Olympic* were as a matter of good seamanship justified in inferring

that the *Hawke* could and would adopt such a course as would keep her clear of the *Olympic* if that ship continued on a course of S. 59° E." I think that the question whether the *Olympic* was justified in assuming that the *Hawke* would proceed on the north side of the Ryde Middle, or on the south side, as the case might be, is a question turning on the construction of the articles, and not a question merely of good seamanship. Art. 21 enacts: "Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed. Note: When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision."

Counsel for the *Olympic* in their argument before us seem to me, on the assumption that the vessels were crossing vessels involving risk of collision (which, of course, they did not accept, except for the purposes of their argument), to have adopted an argument based upon the decision in the Privy Council in the case of *The Pekin* (1), delivered by Sir Francis Jeune, and to have suggested that the rule laid down in that judgment in respect of the duty to follow the buoyed curves of the river bank applies also to the curves of a buoyed channel at sea, and quote the following passages from the judgment of Sir Francis Jeune: "The cases of *The Velocity* (2), *The Ranger* (3), and *The Oceano* (4), have explained and illustrated the distinction which exists in the effect of this rule" (that is arts. 16 and 22 in the Rules for Preventing Collisions at Sea, 1884, 19 and 21 of the present articles) "as regards vessels navigating the open sea, and those passing along the winding channels of rivers. The crossing referred to in art. 16 (now 19) is 'crossing so as to involve risk of collision,' and it is obvious that while two vessels in certain positions and at certain distances in regard to each other in the open sea may be crossing so as to involve risk of collision, it would be completely mistaken to take the same view of two vessels in the same positions and distances in the reaches of a winding river. The reason, of course, is that vessels must follow and must be

(1) [1897] A. C. 532.
(2) L. R. 3 P. C. 44.
(3) (1872) L. R. 4 P. C. 519.
(4) (1878) 3 P. D. 60.

C. A. 1913

THE OLYMPIC AND H.M.S. HAWKE.

Vaughan Williams L.J.

known to intend to follow the curves of the river bank. But vessels may no doubt be crossing vessels within art. 22 (now 19) in a river. It depends on their presumable courses. If at any time two vessels, not end-on, are seen, keeping the courses to be expected with regard to them respectively, to be likely to arrive at the same point at or nearly at the same moment, they are vessels crossing so as to involve risk of collision; but they are not so crossing if the course which is reasonably to be attributed to either vessel would keep her clear of the other. The question therefore always turns on the reasonable inference to be drawn as to a vessel's future course from her position at a particular moment, and this greatly depends on the nature of the locality where she is at that moment."

Counsel for the *Olympic* proceeded to say after making this quotation that they conceived that probably it was a question on which we should be guided by nautical advice, whether in this particular channel, and with two vessels navigating it, it would in the mind of a competent seaman be presumed that each of them would follow their natural course down the channel.

I do not say that the application of the principle of *The Pekin* (1) to a buoyed channel in the sea, as suggested by counsel for the *Olympic*, would be unreasonable; but the difficulty is that this collision occurred in the course of a manœuvre by the *Hawke* to enable her to follow the buoyed channel; and it would seem that even if there had been no cause of collision in the nature of suction or interaction, yet the vessels, by the courses which they respectively adopted in carrying out this manœuvre, would have collided if both of them had continued their respective courses of S. 59° E. and S. 74° E.; and this seems to me to make the application of the *Pekin* rule to buoyed channels in the open sea unimportant.

The third point decided by the President was that the *Hawke* was not to blame for what she did or omitted to do. There is some suggestion that the *Hawke* in the course of her passage towards the place where she began to swerve ought to have foreseen the danger of a collision, and to have eased her speed so as to allow the enormous liner to keep her course in the centre line

(1) [1897] A. C. 532.

of the buoyed channel, and thus have the benefit of the deepest water, and so to have avoided all danger of collision, whether you regard the *Hawke* as an overtaken vessel or as a crossing vessel, or, of course, as an overtaking vessel. We have negatived the contention that she was proved to have been an overtaking vessel. Taking the vessels as crossing vessels or taking the *Hawke* as the overtaken vessel, there certainly was no obligation under the collision rules for the *Hawke* to keep out of the way of the *Olympic*, and the alteration of the course of the *Hawke* might well have misled the *Olympic*. "The rule requiring a ship to keep her course and speed must be observed strictly." (The passage I am quoting comes from Marsden's Collisions at Sea, 6th ed., pp. 411—412.) "So long as there is a possibility of the other ship clearing her, she must stand on. Thus Sir James Hannen refused to find a sailing ship to blame for taking no step, until the last moment, to avoid collision with a steamer which she saw was taking no measures to keep out of the way. The guide of the steamer's action is the presumption that the sailing vessel will keep her course. With reference to the same rule under a previous Act, Dr. Lushington said: 'I wholly deny that danger would be averted, or that infinitely greater danger would not occur, if a vessel close-hauled on the larboard tack, on descrying a steamer, were to take upon herself to deviate from her course for the purpose of getting out of the way; because I am of opinion that by so doing it would lead to the chance of infinitely more collisions than at present.'"

It seems uncertain on the cases whether the exception to the rule only arises when a collision is inevitable unless averted by the ship which has to keep her course and speed, or whether the exception applies when the collision is so probable that good seamanship, if there were no rule, would justify action by the ship, bound to keep her course, to avert collision. I am inclined to think that in a case where good seamanship would assume that collision cannot be avoided by the action of the giving-way vessel alone, the case falls within the exception, even though in fact the giving-way vessel could by her own action have averted collision. But in this case I agree in the conclusion of the President that there was nothing in respect of this rule which

C. A. 1913

THE OLYMPIC AND H.M.S. HAWKE.

Vaughan Williams L.J.

the *Hawke* did or left undone, which ought not or ought to have been done.

The next point, on which counsel for the *Olympic* suggested that the *Hawke* was blameworthy, was that the helm jammed and prevented the port helm being carried more than one-third of its possible limit, and that within the knowledge of the officers of the *Hawke* the helm had exhibited signs of stiffness which ought not to have been present if the helm had been in good order. In order to test the validity of this imputed blame which it is said would negative inevitable accident, I think that one ought to examine the facts closely to ascertain where the onus of proof was at the moment when the helm jammed. The onus of proving inevitable accident would seem in the first instance to rest with the vessel which ran into the other, but I am inclined to think that the onus shifts so soon as the suction or other uncontrollable cause is accepted, and I think that the onus thereupon is thrown on the *Olympic* to prove negligence, not which might have, but must have, contributed to the accident.

Treating the *Hawke* as an overtaken ship, she undoubtedly did alter her course by porting her helm 5 degrees to go round the Conical Buoy. This prima facie looks like a breach of art. 21, the terms of which I have already set out. The King's ships are not bound by these articles, and no presumption of fault arises from what, in the case of other ships, would be a breach of the regulations. It seems to me that in this case there was no bad seamanship or navigation in making this small diversion of 10 degrees, and that, even if there was, it did not contribute to the accident, but, as far as it goes, militated against it.

The next point is the jamming of the helm. Assuming, as I am prepared to find, that the cause of the collision was what has been called suction, it follows that the onus of proof rested at first on the *Hawke*, which ran into the *Olympic*, but shifts as soon as the prime cause is taken to have been suction or some other uncontrollable force. I have already stated that in my judgment the porting of less than a point before the swerve began did not contribute to the collision, and the question now arises whether the jamming of the helm, which undoubtedly occurred,

transfers the onus back to the *Hawke* in the sense that she must explain how the jamming occurred, and that it did not contribute to the collision; or is the onus on the *Olympic* to prove that the jamming did contribute to the collision? I will deal at once with this question, prefacing the discussion of the question with this observation, that proof that the action of one party or the other is not proved to have contributed to the collision leaves the case a case of inevitable accident, that is to say, a case in which neither party is to blame.

The question of inevitable accident, though not pleaded by the defendants, was certainly dealt with by counsel for the plaintiffs, and was put to Captain Blunt in the course of his cross-examination. Captain Blunt's evidence on this point is as follows: "The President: But why should he exclude his scientific knowledge? The witness: Because I do not wish to set myself up against the engineering experts. The cause of the jamming was, in my view, mainly that the quartermaster put the wheel over faster than the engine could run—is designed to run—and so brought about a temporary jamming of the valve. The word 'jam' is not a good one—a temporary arresting of the valve by going too quick, and the moment he felt the valve arrested by its safety-stop he called for further assistance, and three people springing on the wheel in that position inserted a mechanical jam into the controlling gear. That is my opinion." Counsel for the *Olympic* argued before us that the onus lay on the *Hawke* to prove inevitable accident, and cited the case of *The Merchant Prince* (1), contending that the effect of this decision was to throw upon the *Hawke* the obligation of proving inevitable accident, and that unless they proved that, judgment must go against them; but, in my opinion, counsel for the *Olympic*, by accepting, as they did, the account given by Captain Blunt in his evidence which I have just cited, accepted as a fact a state of things which exonerated the *Hawke* so far as the jamming is concerned, and it seems to me that by their reply counsel in substance affirm the acceptance to which I have just referred. The passage I refer to in the print of the evidence is as follows: "The Attorney-General also said that no point was made about

(1) [1892] P. 9; (on appeal) 179.

C. A. 1913

THE OLYMPIC AND H.M.S. HAWKE.

Vaughan Williams L.J.

the jamming of the helm. Lord Justice Vaughan Williams: Yes, he did. Mr. Laing: If he means by that that the account of the jamming given by Captain Blunt was never challenged, I accept that at once. The account of the jamming as given by Captain Blunt, as was manifest to most of us who followed this case, was well outside the case of *The Merchant Prince* (1), and there was no reason at all why I should challenge the account he gave of the cause of it." But that the matter was apparently before the learned judge is fairly clear, because he finds as a fact that the jamming of the helm did not contribute to the collision. "The only value of the jammed helm is Sir Robert Finlay's contribution to it in his argument, namely, that if this suction took place when at a distance that it could have been easily controlled the effect of the helm while not jammed would have been to control it. The evidence shewed that this suction was not of such overmastering force that it could not have been overcome by the exercise of reasonable care and skill, nor by the reversing of the engines; but that it would have been better—much better as a matter of seamanship—to have kept his port engine going full speed ahead, and to have reversed his starboard engine, there could be no doubt, and one remembers that he had the reserve power of his port engine and that he could have put it ahead at full power and reversed his starboard engine also at full power. If there was anything like a minute between the commencement of the swerve and the collision, it is very difficult to see why that manœuvre should not have been adopted?" In dealing with this matter the President himself, in the course of the case, said that if there had been another six seconds to spare the *Hawke* would have gone under the stern of the *Olympic*. The result in my opinion is that the *Olympic* cannot effectively rely on the "jamming" point except in so far as she alleges that the *Hawke* did not take the proper steps upon the jam occurring.

As I have said already, I agree with the contention of the Attorney-General that if the *Hawke* was in the position evidenced by the *Olympic* witnesses on the trial before the President, or even in the position, which is very different, set forth in the argumentative chart which was the final case made by counsel

(1) [1892] P. 9; (on appeal) 179.

for the *Olympic*, it is impossible that the collision should have occurred. But the Attorney-General, anticipating a possible point (to some extent taken in the reply), suggested that, even discarding the evidence for the *Olympic*, on the overtaking question, whether before the President or as made in the argumentative chart, there must have been a time when the *Hawke* was an overtaking vessel, at all events for a moment, as the *Olympic* was rounding Bramble Point and steadying on her course. I am not sure that in the reply the point anticipated by the Attorney-General is exactly dealt with, for counsel for the *Olympic* rather dealt with the question of the moment when the relation of the vessels is to be determined in deciding whether the vessels are or are not crossing vessels. Generally, I do not think it is denied that this is when they sight each other as crossing vessels. The suggestion seems to be that, in determining whether or not these two vessels were crossing vessels, one should deal with the question on the basis that the two vessels were going side by side down the East Channel. We are advised by our assessors that, according to the *Hawke's* version, she was not when the *Olympic* steadied on her S. 59° E. course in the position of being an overtaking vessel, but that, according to the *Olympic's* version, she was.

In my opinion, as I have already said, the position of the *Hawke* as stated by the *Olympic* witnesses at the moment when the *Olympic* steadied on her S. 59° E. course is impossible. Moreover, I think that the courses adopted by the two vessels in their passage down the buoyed East Channel were clearly intersecting courses which, if the courses were continued, would cause a collision, and we are advised by our assessors "that the *Hawke* was a steam vessel crossing so as to involve risk of collision, but those in charge of the *Olympic*, having regard to the nature of the particular locality, were, as a matter of good seamanship, justified in inferring that the *Hawke* could and would, before any danger actually arose, adopt such a course as would keep her clear of the *Olympic* if that ship continued on a course of S. 59° E." As I have already said, I do not think that this view of our assessors is consistent with arts. 19, 21, 22, and 23. I suppose, although the assessors do not say so,

C. A. 1913

THE OLYMPIC AND H.M.S. HAWKE.

Vaughan Williams L.J.

when they say "adopt such a course as would keep her clear of the *Olympic* if that ship continued her course," they mean that the *Hawke* would as a matter of good seamanship be justified in dropping astern and passing behind the stern of the *Olympic* even though this involved the departure from the rule as to keeping her course and speed on the ground that, though there was no immediate and manifest danger, dropping astern could not mislead.

In the reply counsel begin with a criticism on the judgment of the President based on the assumption that the place of wreckage establishes within very narrow limits the place where this collision happened, and that this alteration from the place assumed by the President cannot stand so far as he finds that the *Olympic* is to blame. They then say that the grounds upon which the President arrived at his decision are that the *Olympic* took so large a turn round the buoy as to bring herself in close proximity to the *Hawke*, with the result that she caused the *Hawke* by that proximity to draw out towards her and so bring about the collision, and say that if you take the place where the wreckage is found as approximately the place of the collision the judgment cannot stand because it demonstrates that the position of the collision was not close in to those buoys as the President has found, but was practically in mid-channel, and that the *Hawke* has to explain, taking the wreckage to mark the new place of collision, how she got out close alongside the *Olympic*. They point out that the President was of opinion that the *Olympic* took too large a sweep when coming round the West Bramble into the channel, and thus came too close to the cruiser on the south side of the channel. In my opinion, the President, when using the words "too close," meant too close for the fulfilment by the *Olympic* of her duty under the rules as a crossing ship, and took too wide a turn to keep down the course in mid-channel.

Counsel for the *Olympic* then take the distance of the *Hawke* from the *Olympic* according to the evidence of the *Hawke* at 440 or 370 yards, according as you measure from the Chequers or the East Conical Buoy, and argue that these distances were a full performance by the *Olympic* of the duty to keep out of

the way, whether you apply as against her art. 24 or art. 19, coupled with the general proviso in art. 21. I agree that their contention is very forcible if you assume that the position of the *Hawke* was that which in evidence the *Hawke's* witnesses said it was, and assume that the *Olympic* did not come to any extent to the south of the mid-channel, but I think that the whole of the facts of the case, including the place of collision now approximately determined by the place of the wreckage, shew that the *Hawke's* witnesses must have placed the *Hawke* further to the south than she really was, and that the *Olympic* must have come considerably south of the mid-channel line. Moreover, I think that the knowledge of suction or interaction is at present too uncertain to enable any one, even a person of the eminence of Professor Byles, the witness of the *Hawke*, to speak positively as to the distance within which such a possible cause will be dangerous in the case of two ships of the relative sizes of the *Olympic* and the *Hawke* proceeding down a shallow channel at the speed of these vessels. Knowledge of the subject is yet in its infancy.

Counsel for the *Olympic*, dealing with the onus of proof, put the case of the *Olympic* in reference to the *Hawke's* position, whether governed by art. 24, the overtaking rule, or by art. 19, the crossing rule, in a very brief and clear summary thus: "We, the *Olympic*, are asserting art. 24. She, the *Hawke*, is asserting art. 19. It may be neither of the articles apply, in which case it would be governed by good seamanship. If there is one fact which is not disputed in this case—I am not sure it is not the only one—it is that the *Hawke* did swerve, I use it as a convenient word, five or six points off her course, and came into the *Olympic*, which was admitted to be substantially on her course at the time of the collision. That is a fact which is common ground. Now if art. 24, that is, the overtaking rule, applies, of course the obligation on the *Hawke* is to keep clear, and she has to bear that burden and shew why she did not. If on the other hand art. 19, the crossing rule, governs, then art. 21 requires the *Hawke* to keep her course and speed. It is conceded she did not, and there is no dispute about it. Therefore she has got to justify the breach of the rules, and the burden is on her to do

C. A. 1913

THE OLYMPIC AND H.M.S. HAWKE.

Vaughan Williams L.J.

it. If good seamanship is to govern this case, then manifestly, if two vessels are at a distance apart which I have suggested, the one vessel which is found off her course five or six points, striking into the side of the other one, must necessarily explain how that came about; therefore the onus, we submit, is on the *Hawke* throughout this transaction, whichever rule governs, or whether no rule governs, to explain this admitted swerve, which word is used for the want of a better."

There are some facts in this summary which I do not entirely accept. One is that the *Olympic* was admitted to be substantially on her course at the time of the collision, and that that is a fact which is common ground; the other is that the *Hawke* did not keep her course and speed, if that means did not keep her course and speed so as to constitute a breach of the rule contained in art. 21, if the diversion was caused by suction or any other uncontrollable force.

On this statement of the position I say, first, that in my opinion the *Hawke* was not an overtaking vessel, and was not under the obligation imposed by art. 24, the overtaking article, to keep clear. Secondly, although under art. 19, the crossing rule, the *Hawke* would be bound by art. 21 to keep her course and speed, yet if the course of the *Hawke* was diverted by suction or some overmastering cause independent of the steering of the *Hawke*, such diversion would not be an infraction of art. 21, and might be, if neither ship was to blame, an inevitable accident, or might be the consequence of the *Olympic* not keeping sufficiently to the north, towards which she had ample room to keep away from the *Hawke*. If it is accepted, as this Court holds, that the *Hawke* did not starboard her helm, and that the cause of the diversion from her course was the involuntary swerving produced by suction or some such cause, it seems to me that the onus of proof thereupon passes to the *Olympic* to shew that, notwithstanding the suction swerve, the *Hawke* could by good seamanship with the helm and its machinery in proper order have avoided the collision.

I think that the *Olympic* has failed to satisfy this onus. The *Olympic* has not proved that if there had been no jamming the suction force could have been controlled. The *Olympic* has not

proved that if there had been no jamming the swerve produced by the suction could have been controlled; on the contrary, the porting of the helm which continued for an appreciable time before the jamming in no degree checked the swerve.

The summary of my judgment is as follows:—

1. That the *Olympic* has not proved, the onus being on her, that the *Hawke* was an overtaking vessel.

2. That the vessels on steadying upon their courses were crossing vessels.

3. That thereupon the onus, on the assumption that the vessels were crossing vessels upon entering the East Channel, was on the *Hawke* to prove that the cause of the collision prima facie was the suction or some other cause independent of the management of the *Hawke*, and that, there being no proof of negligence in the management of the *Hawke* after the commencement of the swerve, the onus of proving that the swerve was inevitable accident rested on the *Olympic*.

4. That the *Olympic* failed to prove that the collision resulted from inevitable accident. On the contrary the evidence shews that the accident resulted from the *Olympic* coming too much to the south and thus unnecessarily exposed the *Hawke* to danger which might have been avoided, inasmuch as the *Olympic* had ample room to keep out of the way of the *Hawke* by keeping further to the north.

For the reasons I have given I think that this appeal must be dismissed. Neither at the trial before the President, Sir Samuel Evans, nor before us has it been suggested that a struggle between the *Olympic* and the *Hawke* to be first in or first out of the East Channel rendered either or both the ships blameworthy in respect of the collision. I therefore feel that one is not entitled to take into consideration as a basis of judgment a question not raised by the litigants.

KENNEDY L.J. We have on the present appeal to review the decision which was given by the learned President of the Admiralty Division in the action instituted by the owners of the steamship *Olympic* against Commander (now Captain) Blunt, of H.M.S. *Hawke*, in respect of a collision between those two

C. A. 1913

THE OLYMPIC AND H.M.S. HAWKE.

Kennedy L.J.

vessels off Cowes on September 20, 1911. The President held that the collision was occasioned solely by the faulty navigation of the *Olympic* and gave judgment accordingly in favour of the defendant. This appeal has been brought by the plaintiffs in order to obtain a reversal of that decision.

If the evidence before us had been confined to that which was given in the Court below, I should have been justified, I think, in limiting my judgment to a very few remarks. The case is difficult, owing to the conflict of testimony and the peculiarity of the immediate cause to which the defendant attributes the collision, but I have heard nothing which convinces me that, upon the evidence as it then stood, the judgment appealed against was wrong in its conclusion; and, subject to some qualifications, to one of which I shall have occasion to advert, the reasoning, upon which it was founded, is reasoning from which I see no cause for dissent. But this Court has on the appeal to consider new and most material evidence, which has come to light since the trial of the action, and which must be taken, as the case has been argued before us, to displace a finding of fact upon which the judgment of the Court below was in great measure founded. At an early point in that judgment the President stated: "If the spot of the collision can be fixed, we have one of the chief determining factors of distances, of courses, and of bearings." He adopted as the true spot that which the defendant alleged, and he rejected all of those more northerly and easterly positions which were designated respectively (for they differed from each other) by the pilot and the master of the *Olympic* and in the plaintiffs' particulars. After his judgment had been pronounced, the bottom of the sea in the locality was explored, and by the work of divers, acting under the supervision of representatives of both of the parties to this action, there has been discovered in one spot, within the area of a circle which measures roughly 30 ft. in diameter, a large quantity of wreckage which has been brought ashore and which consists unquestionably of a large number of fragments of the damaged forward end of the *Hawke*—including one portion of the forefoot no less than 28 ft. in length and 7½ tons in weight—and also, though to a very small extent, of fragments

detached by the collision from the *Olympic*. It appears to me to be practically certain that this wreckage enables us to fix approximately the spot of collision. An attempt was made—or perhaps I should rather say, a theory was suggested—by witnesses who were called on behalf of the defendant before the examiner when he took the new evidence, to reconcile the position of the wreckage with the evidence as to that place of collision which has been asserted, and successfully asserted, by the defendant at the trial of the action.

It is, however, unnecessary to consider this, as the Attorney-General, in his speech for the defendant in this Court, whilst declining to admit that the wreckage determined approximately the place of collision, did not anywhere challenge by argument the correctness of such an inference. That being so, we find that the collision took place at a distance of about 200 yards in a S.S.W. direction from the spot marked on the chart by the master of the *Olympic*, and rather more than 400 yards—two cables—to the north-westward (i.e., more than two cables to the westward and about one cable to the northward) from the spot which was designated by the defendant's witnesses at the trial and which was accepted by the Court below as the spot of collision. Obviously, therefore, those calculations in the judgment as to times and speeds and courses which depend upon that acceptance require, at least, modification. But by far the most important consequence of the alteration of the spot of collision is this. The acceptance in the President's judgment of the defendant's evidence as to the position of that spot naturally and properly involved the acceptance of the defendant's evidence as to the line of the course of the *Hawke* taking her close along the southern buoys—the West Conical Buoy, the Chequers Buoy, and the East Conical (or Prince Consort) Buoy—successively, at a distance of 30 yards or less, until, after the last of these three buoys was passed, the order "Port 5" was given, the helm of the *Hawke* was ported till her head had altered, as Captain Blunt deposed, 10 degrees, and almost immediately afterwards the movement of the *Hawke* towards the *Olympic*, which brought about the collision and which I will call, as it was so called at the trial, "the swerve," began.

C. A. 1913

THE OLYMPIC AND H.M.S. HAWKE.

Kennedy L.J.

Now the wreckage has been found, as I have said, at a point about two cables to the westward and about one cable to the northward of the spot designated by the defendant and accepted by the President as the point of collision. Even if we allow, as I think we ought to do, that the wreckage may not, and probably does not, mark the exact spot of collision, but that the collision occurred some 60 yards (as our assessors think possible) to the W.S.W. of the position of the wreckage, a reference to the chart shews that the new evidence compels us to draw two very important inferences. The first is that the evidence for the *Hawke* as to the point at which the helm of the *Hawke* was ported, which is put at the time when that vessel had passed the East Conical Buoy, is in fact erroneous. If the wreckage determines approximately the place of collision, the porting of the helm and the beginning of the swerve which immediately followed must have taken place at an earlier point, shortly after passing the Chequers Buoy; and that is, I think, the effect of the evidence of Gaudion, a witness for the plaintiffs, who observed from the shore at East Cowes the beginning of the swerve. Even Lieutenant Aylen in one part of his evidence, as it appears to me, supports this view, for he says that it was after passing the Chequers Buoy that the *Olympic* began perceptibly to gain on the *Hawke;* and I think it is clear that the porting of the *Hawke* and the swerve followed closely upon that happening.

But the far more important consequence of the new evidence is this. The evidence of the defendant, that the *Hawke's* S. 74° E. course took her not more than 30 yards—indeed he puts it as, so far as he could judge, 20 yards—from the Chequers Buoy, would place that vessel quite 300 yards from the *Olympic* at the moment when the swerve began. Certainly with such a distance between the two vessels, the hypothesis of a suction or interaction carrying the *Hawke* into the *Olympic* becomes, as the Attorney-General himself stated in the course of his argument for the defendant, untenable, and we are forced to choose one of two alternative views, each of which presents considerable difficulty and one of which, if adopted, would be fatal to the defendant's case. If we accept, as the Court below, being in

error as to the place of collision, did accept, the very positive statements of the defendant himself and Lieutenant Aylen in regard to the line of the course of the *Hawke*—if, that is to say, that line took her, as those officers swore, so close to the Chequers Buoy as 30 yards or less, and, therefore, so far from the *Olympic* as I have just stated, then the only possible explanation of the *Hawke's* swerve into the *Olympic* is that the plaintiffs' main contention is sound and that the *Hawke's* helm was starboarded; and it follows that, whether the *Hawke* be regarded as a crossing steam vessel under art. 19, or an overtaking vessel under art. 24, or a ship on a parallel course, she must be held to blame for the collision which such a starboarding brought about.

If, on the other hand, we hold, contrary to the testimony of the defendant and Lieutenant Aylen, that the line of the course of the *Hawke* was in fact so much more northerly, so much more distant from the Chequers Buoy, as to make it, in view of the knowledge of the spot of collision which the new evidence has given us, possible that the *Hawke* was, at the time when the swerve began, within such a distance from the *Olympic* (a distance which, if I understand Mr. Taylor's interesting theory, cannot be put at more than between 100 and 200 yards) that the obscure external influence called suction or interaction might, even against a port helm, operate sufficiently to take her into the starboard side of the *Olympic*, it is manifest that our disbelief in regard to the evidence which was given on this important matter by the defendant and by Lieutenant Aylen, and which guided, if it did not govern, the decision of the learned President in the defendant's favour, must tend materially to lessen confidence in the accuracy of the observation of these witnesses where their evidence is in conflict with the plaintiffs' evidence in other parts of the case.

After anxiously considering the evidence and the probabilities, the conclusion which I have reached in regard to the crucial question which I have just stated is that the evidence of the defendant and Lieutenant Aylen in this matter was incorrect, and that the *Hawke* on her S. 74° E. course was keeping a considerably more northerly line along the channel than that to which those witnesses deposed. My reason for preferring this

C. A. 1913

THE OLYMPIC AND H.M.S. HAWKE.

Kennedy L.J.

view is a simple one. If she was keeping a line which took her under 30 yards, as they have asserted, or indeed even thrice 30 yards, from the Chequers Buoy, the collision, as I have said, could not have occurred at or near the place where the new evidence proves that it did in fact occur, unless it was caused by the helm of the *Hawke* being starboarded.

Now the President of the Admiralty Division heard the defendant and Lieutenant Aylen examined and cross-examined. His judgment affirms these officers to be entirely honest witnesses. Not only they, but also Lieutenant Bashford and two seamen, one of whom was the helmsman, and all of whom are presumably truthful men, have positively sworn that the helm of the *Hawke* was not starboarded, but was ported. There is no room in regard to this matter for honest mistake on the part of these witnesses. If the helm was starboarded, all the five must have known that it was starboarded, and, therefore, must have perjured themselves in swearing that it was not starboarded and was ported. The judge who saw and heard them give evidence was satisfied of their honesty—and I conceive in these circumstances, according alike to my own independent judgment and according to authority (1), that I should not be justified in imputing to them such a piece of wickedness, if any other conclusion were reasonably possible.

I think that here another conclusion is reasonably possible. It appears, no doubt, to be strange that two officers of the standing of the defendant and Lieutenant Aylen should have so far failed in accuracy of observation as to put the position of their ship as being only some 30 yards or even less outside the Chequers Buoy at a time when the distance must have been much more like 200. It is scarcely less strange to find them putting the point at which the order to "Port 5" was given some two cables further to the eastward than the spot of the collision, as we now know it, allows to be possible. But it is not the first time that apparently strange errors of observation have been found to be justly imputable to honest and skilled witnesses in admiralty cases. In this very case such errors have justifiably,

(1) See *The Alice and The Princess Alice* (1868) L. R. 2 P. C. 245; and *The Glannibanta* (1876) (in the C. A.) 1 P. D. 283.

in my opinion, been imputed by the President in his judgment to the master of the *Olympic*, to the experienced pilot who had charge of her, and to Captain Scott; all of whom, and the two first in a very high degree, were men who had experience and knowledge of nautical matters, and against none of whom any one would dream of charging an intention to speak falsely. There are, I think, circumstances which render the errors of the defendant and Lieutenant Aylen less strange than at first sight they would appear to be. Lieutenant Aylen told the Court that on the evening of the day of the collision he and Captain Blunt went into everything connected with the collision, and in his own words "everything was thrashed out." The evidence of Lieutenant Aylen describes what they did in this process of "thrashing out." Basing their conclusion as to the spot of collision upon an inference of the direction taken and the distance travelled by the *Hawke* to the position at which the *Hawke* came to rest, and which had been fixed, and, as they believed, correctly fixed, by certain bearings taken at that position by Lieutenant Aylen, they calculated backward, from that spot, the line which in their belief must have been pursued by the *Hawke* from the point at which the N. $77\frac{1}{2}^{\circ}$ E. was changed to the S. 74° E. course off Egypt Point, allowance, no doubt, being made for the swerve which led to and immediately preceded the collision.

A calculation so made naturally, and indeed necessarily, led to the double error, first, of making the porting of the helm and the swerve begin after passing the East Conical Buoy, which we know now must have taken place near the Chequers Buoy, and therefore considerably further to the westward; and, secondly, of believing that the *Hawke* had steamed close along the line of buoys instead of pursuing—as, unless the collision with the *Olympic* was caused by the *Hawke* starboarding into her, she must have pursued—a considerably more northerly line.

The conviction that the *Hawke* had pursued the more southerly line along the buoys might, I think, without the slightest dishonesty of purpose on their part, induce the belief that they had observed that which, if their conviction as to the course had been well founded, they would have observed. And indeed it is,

C. A. 1913

THE OLYMPIC AND H.M.S. HAWKE.

Kennedy L.J.

I think, clear from their own evidence that, in working out their course backward from the place which they assigned to the collision, they did not work out the N. 77½° E. course correctly. If they had done so, they would have found that the course of the *Hawke* must have been, at and from the time of the alteration off Egypt Point, more northerly than, working her course out backward, they took it to be. For Lieutenant Aylen has deposed that when, after turning at a point to the S.W. of the Solent Bank Buoy, the *Hawke* started on the eastward course N. 77½° E. (magnetic), he found she was one cable to the southward of the line it had been intended to take. Taking the start of the *Hawke* on the N. 77½° E. course to have been, as Lieutenant Aylen has deposed, from a point one cable to the S. of the intended course, which would, Lieutenant Aylen says, have taken the *Hawke* five cables off Egypt Point, and not, as the defendant and Lieutenant Aylen, working backwards from the assumed spot of collision, appear to me to have put it, at a cable and a half to the southward of the intended course, we find that the *Hawke* would, when that course was altered to S. 74° E. off Egypt Point, have been half a cable, at any rate, more to the north than the defendant and Lieutenant Aylen have placed her, and, therefore, so much further from Egypt Point than the three and a half cables which both these witnesses have asserted that the *Hawke*, in keeping along the channel on the S. 74° E. course, to which the N. 77½° E. was there altered, would not have passed close along the buoys, but at least at a distance of some 130 yards from them. Further, a slight error as to the point at which the N. 77½° E. course was altered to the S. 74° E. course—if, that is to say, the N. 77½° E. course was in fact prolonged somewhat further than those witnesses believe—the line pursued by the *Hawke* along the channel would be more northerly still, and, by bringing her therefore still closer to the *Olympic* at the time when both vessels had just passed the Chequers Buoy, would increase the probability of the operation of the force of suction or interaction consistently with the happening of the collision at the spot which has now been approximately determined by the wreckage.

Having come to the conclusion that the unfortunate errors of

the defendant and Lieutenant Aylen in regard to the course of the *Hawke* along the channel and the point at which her porting began are so far reasonably explicable, that we should not be justified in holding that they and Lieutenant Bashford and the two seamen called from the *Hawke* had been guilty of perjury in the witness-box, and that, contrary to their explicit evidence, the helm of the *Hawke* was in fact starboarded, we still have to inquire, with the light of the new evidence in regard to the place of the collision, but, at the same time, upon the hypothesis that its immediate cause was some suction or interaction and not a starboarding of the *Hawke*, whether the *Hawke* or the *Olympic* or both of them ought to be held to blame.

The case of the *Olympic*, whose owners are the plaintiffs in the action, is that at the material time, which is the time when the *Olympic*, after rounding the Bramble Buoy, was steadied on her S. 59° E. course, the *Hawke* was an overtaking vessel within the meaning of art. 24 of the regulations for preventing collisions at sea; that consequently it was thenceforward the duty of the *Olympic* to keep her course and speed, and the duty of the *Hawke*, as the overtaking vessel, to keep out of her way; that she did keep her course and speed, and that the *Hawke* did not keep out of her way and so caused the collision.

It is important to bear in mind that the burden of proving that the *Hawke* was an overtaking vessel lay upon the plaintiffs. If they had made this out, I think that the *Hawke* must have been held to blame. It is clear to my mind that before the two vessels, after passing the Chequers Buoy, came into fatal proximity, she could have avoided any risk of collision by stopping or easing her engines; and if, as the new evidence shews, the *Hawke* must have been more near the mid-channel, and therefore considerably further from the line of the buoys than her witnesses admit, I am by no means sure that she had not room to prevent the risk without a change of speed by a moderate porting of her helm before that point was reached. When it was reached she did port, but the action of the helm was ineffectual owing to the jamming of the gear. I am of opinion that, if the duty lay upon the *Hawke*, as the overtaking vessel, to keep clear of the *Olympic*, the occurrence of this

C. A. 1913

THE OLYMPIC AND H.M.S. HAWKE.

Kennedy L.J.

mishap would not have saved her from blame (see *The Merchant Prince* (1)), for, with all due respect, I cannot concur with the learned President that this jamming of the steering gear can be treated as an "accident for which no one is responsible." It appears to me that the effect of the evidence of Captain Blunt is that the helm jammed through the negligent and unduly violent handling of the gear.

In my judgment, however, this Court is relieved from the necessity of considering what ought to have been the judgment of the Court if the *Hawke* had been found to be at the material time in the position of an overtaking vessel under art. 24. The burden of proof lay upon the plaintiffs, and in my view they have failed to make out their case.

In regard to this point the material time is the time at which the *Olympic* steadied after rounding the Bramble Buoy and her engines were put at full speed. The question to be answered is whether or not at this moment the *Hawke* was, as the plaintiffs allege she was, an overtaking vessel within art. 24, that is, coming up with the *Olympic* and in a position more than two points abaft the beam of the *Olympic*. It is just possible, but it is also immaterial, that at some point in the course of the *Olympic's* manœuvre of turning round the Bramble Buoy the *Hawke* had been momentarily in such a position in regard to her. Now two things are clear. First, the new evidence settles with sufficient precision the position of the *Olympic* when she steadied. It must be the position, somewhat to the south of the point marked upon the chart by the master of the *Olympic*, from which you can draw a line on a S. 59° E. course that will pass a little—our assessors think some 60 yards—to the W.S.W. of the wreckage. Secondly, the *Hawke* at this time was travelling, and, until the swerve commenced, continued to travel, at a uniform pace—not exceeding 15¼ knots. The fact that the *Hawke's* was a converging and not a parallel course is, so far as regards art. 24, immaterial. The question is, was the *Hawke* coming up with the *Olympic* from a direction more than two points abaft the *Olympic's* starboard beam? It is incumbent upon the plaintiffs to establish the affirmative; and, in my opinion, they have not

(1) [1892] P. 179.

succeeded in doing so. Upon this point we have, I think, certain data as to the speeds of the two vessels, distance run, and time occupied, which furnish a clue to guide us to a clear judgment out of the labyrinth of doubt created by the contradictory evidence of the eye-witnesses who were called on the one side and on the other.

In the Court below the position of the *Hawke* in regard to the *Olympic* at the time when the *Olympic* was steadied on the S. 59° E. course was put by the plaintiffs' witnesses as being about two to three points on the starboard quarter of the *Olympic*—that is, about five to six points abaft the beam—and at a distance of about a quarter of a mile. Taking the place of collision to be that fixed by the *Hawke*, and taking the speed of the *Hawke* to be that which, in my judgment also, it has been proved to be, namely, a uniform speed of not more than 15¼ knots, and the speed of the *Olympic* to have been at the moment of steadying, when her engines began to be put at full speed, only 12 knots, the learned President in his judgment has shewn that a collision could not possibly have taken place within the space of three minutes, which, according to the log of the *Olympic*, was the space of time which elapsed between the steadying of that vessel and the collision, or even within the space of four minutes, if a minute is added to that logged time; and that the collision could only take place if the *Hawke* travelled at a speed greatly exceeding that which we know she had, or if the *Olympic* travelled at a speed far less than we know she had. Mutatis mutandis, as it appears to me, the reasoning which the President applied is applicable also if we adopt the place of collision which has been determined approximately by the new evidence.

The plaintiffs appear to have appreciated the formidable difficulty in their way, if they had to maintain the correctness of the evidence of the witnesses who were called from the *Olympic* as to the distance and bearing of the *Hawke;* and, at the hearing of the appeal, their counsel have argued upon the basis of the distance of the *Hawke* from the stern of the *Olympic*, at the time when the latter vessel was straightened on the S. 74° E. course, having been only some 70 yards, and of

C. A. 1913

THE OLYMPIC AND H.M.S. HAWKE.

Kennedy L.J.

the bearing of the *Hawke* aft of the beam of the *Olympic* not exceeding three points. This new position was illustrated by a marked chart, put before us by Sir Robert Finlay as part of his argument, and referred to at the hearing as the "argumentative chart."

In my judgment, however, the new position—the adoption of which, it is to be noted, convicts the pilot and the master of the *Olympic* and other witnesses called by the plaintiffs of inaccuracy in regard to a most important part of their case—does not get rid of the difficulty in the way of the plaintiffs in their attempt to prove that the *Hawke* was an overtaking ship. The argument of the Attorney-General appeared to be sound when he worked out a calculation that, even if the new position be assumed, and, in favour of the plaintiffs' case, three minutes be allowed for their covering the distance, the stem of the *Hawke*, if she started from that position, could not, in the time, have reached the level of the bridge of the *Olympic* (as the plaintiffs' own evidence shewed that it did) just before the fatal swerve began. To do this, she would have had to travel, in addition to the distance travelled by the *Olympic*, the additional 70 yards which separated her from the *Olympic* at the start, plus the 690 ft. which represents the distance from the stern of the *Olympic* to her bridge—altogether $1\frac{1}{2}$ cables—and this would necessitate, in regard to the *Hawke*, a speed of at least three knots greater than the speed of the *Olympic*, so that, if the average speed of the *Olympic* over the distance be taken at only 14 knots, the speed of the *Hawke*, instead of being, as we know, $15\frac{1}{4}$ knots, must have been at least 17 knots. In fact, if the evidence of the master of the *Olympic* on the question of her speed was correct, and, starting at 12, she could attain her maximum reduced speed of 20 knots in three or four minutes, the rate of increase in speed during the three minutes since she had been put on her course of S. 59° E. would, I think, give her a higher average, so that a speed even exceeding 17 knots would have to be attributed to the *Hawke*, in order to bring the *Hawke's* stem to the level of the *Olympic's* bridge within the time. It will be observed that this calculation concedes to the plaintiffs an allowance of

time, for which the learned counsel for the plaintiffs argued, beyond the three minutes given by the *Olympic's* log as the time which elapsed between her going full speed with her engines when she was straightened in the channel and the collision itself. I should be very slow indeed to add to the complications of this case by deviating, without stronger reason than the plaintiffs have shewn, from the written record of their ship. But it is not necessary for me to enter upon a detailed consideration of this question of time in regard to the navigation of the *Olympic*. It will be found fully and minutely discussed in a passage of the judgment of Parker J. (now Lord Parker), which will be read presently and in which I fully concur.

I have only to add that if you take the initial point at which the *Hawke* starts according to the argumentative chart—the place at which she is there put at the time when the two blasts were blown on board the *Olympic*—and allow, in favour of the plaintiffs, four minutes for her traversing the distance between the place where on the same chart she is marked as steadying and the place of collision, and, therefore (the time when the *Olympic* blew the two blasts being taken at 12.41 and the collision at 12.47 P.M.), leave only two minutes for the distance to be travelled between that which I have called the initial point and the place where the *Hawke* steadied, I agree with the Attorney-General that the plaintiffs' case is, in regard to the speed of the *Hawke*, involved in an even greater difficulty, for the distance is about eight knots, and this would require a speed on the part of the *Hawke* of little under 24 knots.

If art. 24 does not, does art. 19 apply to the present case? That article runs thus: "When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other." Now there can be no doubt that the *Hawke* and the *Olympic* at all material times were crossing vessels, in the sense that they were on converging and intersecting courses. Therefore, inasmuch as the *Olympic* was the vessel which had the other on her starboard side, and did not keep clear of that other vessel, the *Olympic* would, prima facie, be held to blame for a violation of this art. 19. Counsel for the plaintiffs, however, contended

C. A. 1913

THE OLYMPIC AND H.M.S. HAWKE.

Kennedy L.J.

that this prima facie view was not the true view. There can, I venture to think, be no doubt that in certain special circumstances, although two steam vessels are visibly approaching one another on converging courses, this art. 19 will not be held to regulate their respective duties towards each other. *The Velocity* (1), where the collision took place in the river Thames, at a part where the river winds, is an example of this. The special circumstances can rarely, if ever, exist in the case of steam vessels on converging courses in the open sea, but I see no reason for confining them to the navigation of a river. In the case of *The Albano* (2), in which the collision had taken place off Halifax, Lord Gorell, delivering the judgment of the Privy Council, quoted with approval the language which had been used by Lord St. Helier in the earlier case of *The Pekin*. (3) "The late Lord St. Helier," said his Lordship, "in delivering the judgment of this Board in the case of *The Pekin* (3), though dealing with a collision in a river, used language which may be regarded as not inappropriate to this case. In one passage he is reported thus: 'If at any time two vessels, not end on, are seen, keeping the courses to be expected with regard to them respectively, to be likely to arrive at the same point at or nearly at the same moment, they are vessels crossing so as to involve risk of collision; but they are not so crossing if the course which is reasonably to be attributed to either vessel would keep her clear of the other. The question, therefore, always turns on the reasonable inference to be drawn as to a vessel's future course from her position at a particular moment, and this greatly depends on the nature of the locality where she is at that moment.'"

In the present case, the *Hawke* and the *Olympic*, when the latter vessel steadied and was set on her S. 59° E. course, and the former, with the *Olympic* on her port beam, was pursuing the S. 74° E. course, to which, as Captain Blunt told the Court below, he had altered his N. 77½° E. course, because he had observed the *Olympic*, and knew by her whistle signal that she was going down the eastern channel, were steam vessels on

(1) L. R. 3 P. C. 44. (2) [1907] A. C. 193.
(3) [1897] A. C. 532, at pp. 536, 537.

intersecting and converging courses. If those courses were continued, there would be risk of collision. Therefore prima facie, as I have said, art. 19 applied, and it was the duty of the *Hawke* to keep her course and speed, and for the *Olympic*, which had the *Hawke* on her starboard side, to keep out of the way of the *Hawke*. But if I correctly follow the argument of the plaintiffs' counsel, they say that, having regard to the locality, those in charge of the *Olympic* had a right (as a matter of seamanship) to expect that the *Hawke* would follow the contour of the southern side of the channel, and by the use of the port helm would cease to be a crossing vessel before any danger of collision actually arose. There can be no doubt that in Captain Blunt's own view it was his duty to keep as near to the starboard side, which he calls "his own side," of the channel as he could. It is quite true, on the other hand, that Captain Blunt has also said, and, as our assessors advise us, said correctly, that the S. 74° E. course down the channel is a proper course for a vessel to pursue, whether it is intended to proceed ultimately to the north or to the south of the Ryde Middle, by which I understand that the choice remains open until a point in the channel is reached which would be further eastward than the point at which the collision occurred. But it is, I think, a fair inference from Captain Blunt's evidence taken together, that the presence of the *Olympic* to the northward of the *Hawke* in the channel, which led him off Egypt Point to port his helm and alter to a more southerly line the N. 77½° E. course which would have brought him to the north side of the Ryde Middle, continued to operate to prevent him from taking this course; and Lieutenant Aylen, after stating that "the original intention when we turned up to the eastward was to go back on the same line as we came down on, that was the north of the Ryde Middle," went on to say: "Q. Did you ever hear anything to the contrary, that you were going, instead, south by the Ryde Middle? A. Only when we altered course.—Q. What was said about the Ryde Middle? A. Nothing was said about it. I could see we were going south of the Ryde Middle.—Q. Did the captain tell you you were? A. No. I could see we were keeping course for that direction.—Q. When you got to the Prince Consort Buoy could you have gone north

C. A. 1913

THE OLYMPIC AND H.M.S. HAWKE.

Kennedy L.J.

of the Ryde Middle by starboarding? A. Well, it would be rather a silly thing to do.—Q. I did not ask you that; could you have done it? A. If the *Olympic* had not been there, certainly."

The plaintiffs in these circumstances invite us to hold that those in charge of the *Olympic* were entitled to act upon the view which I have stated, namely, that art. 19 does not apply to this case because the danger of the intersecting courses would be terminated by the *Hawke* pursuing the natural course of a vessel in her position in that locality, which was intending to follow the line of the buoys and proceed to the southward of the Ryde Middle. And our assessors have advised us that the *Hawke* was a steam vessel, crossing so as to involve risk of collision, but those in charge of the *Olympic* were, as a matter of good seamanship, justified in inferring that the *Hawke* could and would adopt such a course as would keep her clear of the *Olympic* if that vessel continued on a course of S. 59° E. If this is correct, and if the pilot who was in charge of the *Olympic* had in fact drawn and acted upon any such inference, much consideration, I think, would have been due to the plaintiffs' argument that this case was one of those in which, according to the law laid down by the Privy Council in *The Pekin* (1) and *The Albano* (2), art. 19 ought not to be held to apply, but that the relative duties of the crossing vessels ought to be governed by the rules of good seamanship; and that, according to those rules, the *Hawke* should—as, if the line of her course was as northerly as the new evidence of the place of collision demands, she could—before passing the Chequers Buoy have ported sufficiently to avoid a collision, and, not having done so, that she ought to be held to be, in part at any rate, to blame for the collision.

In fact, however, the argument, as it appears to me, is untenable, for the simple reason that the pilot, who was responsible for the navigation of the *Olympic*, did not draw, and therefore, of course, did not, in directing her navigation, act upon, any such inference. He did not attribute to the *Hawke* an intention to keep to the southward close along the buoys and onward so as to pass to the southward of the Ryde Middle. On the contrary,

(1) [1897] A. C. 532. (2) [1907] A. C. 193.

he told the Court below that when he looked at the *Hawke* after the *Olympic* had been steadied on the S. 59° E. course he thought that the *Hawke* was going on his port side to the northward of the Ryde Middle. He misjudged her position, assumed that she was an overtaking vessel, and troubled himself no more about her until her stem was about level with his bridge. It seems to me to follow that the necessary foundation for the argument against the application of art. 19 is wanting, that that article did apply, and that the *Olympic* has rightly been held to blame for the violation of its directions. She occasioned the collision by taking no step whatever to keep out of the way of the *Hawke*, which was a crossing steam vessel on her starboard side. A very slight starboarding on the part of the *Olympic* almost up to the last moment would have prevented the collision, and there was ample room to the northward for the execution of such a manœuvre.

The only matter which remains for consideration is whether the *Hawke* ought also to be held to be in fault. In regard to the complaint as to the omission to give the appropriate sound signals when the *Hawke* ported just off Egypt Point, and later, just before the swerve, I need not add anything to what the learned President has said in his judgment in regard to it. Neither these omissions nor the slight porting after passing the Chequers Buoy did in fact contribute, nor could by any possibility have contributed, to the collision. I agree with the learned President also in finding that the *Hawke* was not to blame for not acting otherwise or earlier. She was bound under arts. 19 and 21, read together, to keep her course and speed; and the Courts of this country in adjudicating upon collision cases have always inculcated the duty of adherence to this provision, and have been slow to condemn a navigator upon a charge of its too rigid observance, while they have also recognized the possibility that the persistent wrong-doing of the vessel which ought, according to the regulations, to keep out of the way may create a situation in which a departure from this provision becomes justifiable and proper: see *The Rosalie* (1); *The Commerce*. (2) The law on this point was laid down very clearly by the judgment

(1) (1880) 5 P. D. 245. (2) (1850) 3 W. Rob. 287.

C. A. 1913

THE OLYMPIC AND H.M.S. HAWKE.

Kennedy L.J.

of the Privy Council in 1879 in *The William Frederick and the Byfoged Christensen.* (1) In the present case, as the President points out, action on the part of the *Olympic* almost at the last moment might have prevented the occurrence of the collision.

In regard to the measures taken on board the *Hawke* when the swerve had commenced, it is possible but by no means certain that if the steering gear had not jammed and the helm had been put hard-a-port the collision would have been averted. Our assessors are not entirely in accord upon this point. As I have had occasion to state in an earlier portion of this judgment, I find myself unable for the reason there given to concur in the view of the learned President that this jamming ought to be regarded as an accident for which no one is responsible. But this difference of opinion is unimportant, because it rested upon the plaintiffs to prove that if the gear had not jammed the collision would have been prevented, and they have not done so. A similar remark applies to the question which the plaintiffs have raised as to the orders which, almost in the agony of the collision, were given by Captain Blunt to the engine-room of the *Hawke*. Speaking for myself, I should have declined to hold the *Hawke* to blame for an error of judgment on the part of the commander in such a moment of sudden stress, even if it had been shewn that something possibly better might have been done with the engines than was done. But that, in my view, has certainly not been shewn to my satisfaction in this instance. The suggestion, as I understood it, made on the plaintiffs' behalf, is that Captain Blunt, instead of ordering both engines full speed astern, ought to have kept the port engine full speed ahead. That raises a technical question, upon which the fact that our assessors differ in opinion confirms me in the judgment that the plaintiffs have on this point also failed to prove that, had different orders been given to the engine-room, the vessels would not have come into contact with each other.

In my judgment this appeal ought to be dismissed with costs. The appeal of the Commissioners for executing the Office of Lord High Admiral of the United Kingdom against the judgment of the learned President dismissing the cross-action brought by

(1) (1879) 4 App. Cas. 669, at p. 672.

them against the owners of the *Olympic* was not proceeded with when the appeal came on for hearing in this Court, and therefore there is nothing to say about it except that it also must be dismissed with costs.

The following judgment was read by Kennedy L.J. for—

LORD PARKER OF WADDINGTON. Upon the new evidence before the Court I think the place of collision must be taken as approximately determined by the finding of the wreckage.

I am not prepared to say that the theory propounded on behalf of the *Hawke* as to how the wreckage might have reached this spot where it was found, even though the actual collision took place about 400 yards further east and 100 yards further south, is absolutely impossible, but it appears to me to involve difficulties and improbabilities so great that it ought to be rejected. Indeed the Attorney-General argued the case for the *Hawke* on that footing. So far, therefore, as the judgment of the President turned on his finding that the place of collision was that contended for by the witnesses for the *Hawke*, such judgment must necessarily be reconsidered.

One of the few points on which there is no conflict of evidence is that when the two vessels on their course eastward were off Cowes at a distance from each other of 100 to 300 yards, the *Hawke*, which was the inside vessel, came round to port as though under a starboard helm and ran into the *Olympic* about 90 feet from the stern. Those on board the *Olympic* and certain other independent witnesses thought that the *Hawke* had starboarded in order to pass under the stern of the *Olympic*, and this inference was I think under the circumstances the most natural inference to draw. On the other hand three officers and two seamen on board the *Hawke* were called to prove that the *Hawke's* helm had never, in fact, been starboarded, but that, on the contrary, she came round to port and ran into the *Olympic* against a port helm. By way of strengthening this evidence further witnesses were called to shew that the behaviour of the *Hawke* in coming round to port against a port helm might be accounted for by what was referred to as suction, but may possibly be better described as the interaction of two vessels moving through comparatively

C. A. 1913

THE OLYMPIC AND H.M.S. HAWKE.

Lord Parker of Waddington.

shallow water at great velocity and in close proximity. That there may at times be such interaction has already been recognized in admiralty cases, but the laws which govern it have been hitherto imperfectly investigated and are comparatively unknown. The President, who had the advantage of seeing the witnesses, found as a fact that the helm of the *Hawke* had never been put to starboard and that the behaviour of the *Hawke* was to be explained by these comparatively unknown forces of interaction. The first question we have to determine is how far this finding of fact is affected by the new evidence as to the place of collision.

The new evidence as to the place of collision affects the matter in the following way. According to the *Hawke's* evidence she passed the Chequers Buoy at a distance of 20 yards only, and her distance from the *Olympic* when she came round, as under a starboard helm, was 100 to 150 yards only. These distances were both consistent with the place of collision having been approximately as contended for by the *Hawke*. One or other of them is quite inconsistent with the place of collision as determined by the spot where the wreckage was found. If the *Hawke* really passed the Chequers Buoy at a distance of 20 yards only, her distance from the *Olympic* when she came round to port must have been at least 300 yards, and conversely, if her distance from the *Olympic* at the moment in question was only 150 yards, she must have passed the Chequers Buoy at a distance very much greater than .20 yards. Further, on the evidence in the Court below, the forces of interaction between the two vessels at a distance of 300 yards would be negligible and could probably be counteracted by helm action at any distance beyond 200 yards. Counsel for the *Olympic* invited us for those reasons to find that the forces of interaction were not the cause of the collision, but that the *Hawke's* helm had in fact been starboarded, not in pursuance of any order from her officers, but by mistake of the man at the wheel. It is quite clear, as counsel no doubt felt, that we could not find that the *Hawke's* helm had been starboarded pursuant to an order in that behalf without in effect holding that the *Hawke's* officers had conspired to deceive the Court. It seems to me, after a careful study of the evidence, that the same result

would follow if we found that the *Hawke's* helm had been starboarded by mistake. Only in very special cases ought the Court of Appeal to reverse a finding of fact which must have depended entirely on the credibility of the witnesses in the Court below, and I think that the following considerations will shew that there is in the new evidence nothing which would justify any doubt being thrown on the credibility in this respect of the *Hawke's* officers or men, even though on some points they have made mistakes.

As soon as the *Hawke* had come to rest after the collision, her position was fixed by Lieutenant Aylen, and there can be no reason to doubt the correctness of the bearings taken by him for that purpose. From the position of the *Hawke* so determined Captain Blunt and Lieutenant Aylen appear to have determined by a process of calculation the place of collision put forward on their behalf at the trial and adopted by the President. In view of the new evidence their calculation must have been erroneous, and it is easy to see how their evidence at the trial must have been influenced by this initial error. They knew the course they had been on since rounding Egypt Point; they could calculate approximately their speed. From these data and the place of collision the position of the *Hawke* at any material time prior to the collision followed as a matter of course. It often happens to the most careful and scrupulous witness that what was originally an inference subsequently seems to have been a matter of actual personal observation. I think, therefore, that the actual course of the *Hawke* from Egypt Point past the Chequers Buoy can be put considerably further north without any reflection on the complete honesty of any of the *Hawke's* witnesses, and there are I think reasons for the conclusion that it must have been further north. In the first place, there can be no doubt that Captain Blunt's original intention was to bring the *Hawke* back from the Solent Bank along the line shewn on the impounded chart. In making the turn, however, Lieutenant Aylen came about a cable south of this line. This he discovered by bearings taken immediately after the turn. The course of the *Hawke* worked out backwards from the place of collision assumed by Captain Blunt brings the *Hawke* very nearly a cable and a half south of

C. A. 1913

THE OLYMPIC AND H.M.S. HAWKE.

Lord Parker of Waddington.

the line in the impounded chart. Further, according to Captain Blunt, he ported his helm 5 degrees as soon as the Old Castle Buoy was clear of the East Conical Buoy. This was very shortly before the *Hawke* commenced her swerve towards the *Olympic*. If the wreckage determines the approximate place of the collision the swerve and the manœuvre which preceded it must be put some two cables further west than was done by the *Hawke's* witnesses, and it follows from this that the *Hawke's* course must have been considerably further north than her witnesses thought; otherwise the Old Castle Buoy would not have been clear of the East Conical Buoy. Further it must be remembered that the wreckage can only fix approximately the actual place of first contact between the colliding vessels. It is at least probable that having regard to all the circumstances this position was 75 yards more or less to the south-west of the spot where the wreckage was found. I have come to the conclusion, therefore, not only that the *Hawke* did not in fact starboard, but that there is nothing in the new evidence which would justify this Court in holding that the forces of interaction to which I have referred must have been inoperative.

The next point for consideration is whether the *Hawke* was ever, as contended on behalf of the *Olympic*, the overtaking vessel. This depends on whether she was at any material time coming up with the *Olympic* from a direction more than two points abaft the *Olympic's* beam. I accept the *Olympic's* contention that the material time for determining this question was the moment when the *Olympic* steadied on her course S. 59° E. after completing her turn eastward out of the Thorn Channel. The pilot and the master and other officers of the *Olympic* all deposed that at this point of time the *Hawke* was some two to three points on the *Olympic's* starboard quarter, that is to say, some five or six points abaft her beam, at a distance of about five cables. On the other hand, the *Hawke's* officers were equally certain that the *Hawke* was not at this point of time or at any material time as much as two points abaft the *Olympic's* beam. Having regard to this conflict of evidence, the President endeavoured to ascertain whether any light was thrown on the matter by what was known of the respective courses of the two

vessels, their respective speeds, and their several positions at ascertained times prior to the collision. These considerations, which, of course, were very materially affected by the fact that he accepted the place of collision contended for by the *Hawke*, led him to the conclusion that it was quite impossible for the *Hawke* to have been at any material time two points abaft the beam of the *Olympic*. In my opinion, upon the facts found by the President, and having regard particularly to the assumed place of collision, this conclusion was inevitable. If, however, the place of collision was approximately where the wreckage was found, it is necessary to reconsider the whole question. What, then, are the data upon which our conclusions must be based?

First of all it seems quite certain that the *Olympic* steadied on a course of S. 59° E., and her position in the channel when she so steadied is determined by the place of collision. Roughly speaking, it must have been about a cable to the south of the point in that behalf marked by her master. Again we know that according to the *Olympic's* clocks she had the North Thorn Buoy abeam at 12.37 and the Thorn Knoll Buoy abeam at 12.40, and that the collision occurred at 12.46. The *Olympic's* clocks are electric, the minute hand advancing once a minute and at the commencement of each minute. Any recorded time therefore means an actual time of from one to fifty-nine seconds later than the record. There is reason for supposing that the actual time of the collision was nearer 12.47 than 12.46. It is not unfair therefore to assume that very nearly seven minutes elapsed between the time when the *Olympic* had the Thorn Knoll abeam and the moment of first impact. The distance between the Thorn Knoll Buoy and the place of collision has to be considered in three sections—that is to say (1.) the distance between the Thorn Knoll Buoy and the place where the *Olympic* blew her two blasts to shew she was bound eastward; (2.) the distance between the latter point and the place when she first steadied on her course; and (3.) the distance thence to the place of collision. Assuming the position of the *Olympic* when she blew the two blasts was as deposed to by the pilot and her master (and this is in substantial accordance also with Captain Blunt's evidence), the time required to cover the first section would be at least one

C. A. 1913

THE OLYMPIC AND H.M.S. HAWKE.

Lord Parker of Waddington.

minute. The distance is approximately three cables, and the speed of the *Olympic* could not very well have exceeded 18 knots. According to her witnesses it was rather less at Thorn Knoll, and she there commenced slowing up for her turn east. This leaves six minutes for the two last sections. From the place where the blasts were blown to the place of steadying is 6·9 cables, and the *Olympic* in traversing that distance slowed down to 12 knots. From the place of steadying to the place where the wreckage was found is 8·9 cables, and in traversing this distance her speed was increasing all the time. It is reasonable to suppose, therefore, and indeed it was assumed throughout the argument of her own counsel, that she would require three minutes to cover the distance from the place where she blew the two blasts to the place where she steadied. This would leave three minutes to cover the distance from the place of steadying to the place of collision, and this also accords with the evidence of her master.

Passing to the *Hawke*, it appears reasonably certain that her speed for the six minutes preceding the collision was an uniform speed. She was on her four-fifths power trial and the revolutions of her engines were being recorded. The number of these revolutions per minute with a clean bottom would give her a speed of 16·4 only, and she had not been in dock for over a year and the tide was against her. Her actual speed could not therefore have been much in excess of 15 knots. If when the *Olympic* steadied on her course she was five to six points abaft the *Olympic's* beam at a quarter of a mile distant, she could not possibly have reached the place of collision in three minutes unless her speed had been considerably over 16 knots an hour. Taking what has been called the argumentative chart as representing the best case which could be made for the *Olympic* on the evidence—that is, putting the *Hawke* only three points abaft the *Olympic's* beam when the latter vessel steadied, and rejecting entirely the evidence of the *Hawke's* officers as to her course round Egypt Point and subsequently—the distance which the *Hawke* would have to travel in those three minutes would be 9·7 cables, and this would involve the impossible speed of over 18 knots an hour. The advisers of the *Olympic* were so oppressed with this difficulty

that they advanced the theory that the time recorded in the *Olympic's* log as the time when she had the Thorn Knoll Buoy abeam was erroneous and should have been 12.39 and not 12.40. This would, of course, give us an extra minute somewhere, and by taking three-quarters of this minute between the *Olympic's* place of steadying and the place where the wreckage was found, the *Hawke's* speed would be reduced to 15½ knots. It is to be observed that there was a difficulty in taking the whole minute for this last section for the following reason. The evidence of the pilot and Mr. Lashmar (if such evidence be accepted) approximately determines the position of the *Hawke* when the *Olympic* blew her two blasts. Her speed, therefore,—assuming it, as I think is proved, to have been uniform—had to be so fixed as to bring her up from this position to a point at least two points abaft the *Olympic's* beam and then take her to the place of collision at an uniform speed. No doubt it was for this reason that a quarter of the extra minute is taken elsewhere. This, however, is not very important, for in my opinion there is no justification whatever for taking the extra minute at all.

I do not think that the *Olympic* can be allowed to this extent to throw over the evidence of her own witnesses, and her own log, more especially as no suggestion to that effect was made in the Court below. Further, in my opinion the evidence of the *Hawke's* witnesses as to her course after rounding Egypt Point having been throughout S. 74° E. must be accepted. Lieutenant Aylen says he verified the course by the compass, and it is not a point on which he could very well have been mistaken. Supposing that when the *Olympic* blew her two blasts the *Hawke's* stern was on the line drawn from Lashmar's yacht to the East Lepe Buoy and her position in the channel was three-quarters of a cable south of the course marked on the impounded chart, her distance from the wreckage would be just about 16 cables. She would cover this in six minutes at 16 knots and never be two points abaft the *Olympic's* beam. If the actual place of collision be some 75 yards or thereabouts S.W. of the wreckage, as is not improbable, and if Mr. Lashmar, as is quite possible, fixed the position of his yacht a little too far south, the distance which the *Hawke* would have to cover in the

C. A. 1913

THE OLYMPIC AND H.M.S. HAWKE.

Lord Parker of Waddington.

six minutes might easily be reduced by half a cable, and this would reduce her speed to 15½ knots, the speed assigned to her on the footing of the argumentative chart, and that without taking any extra minute. This, too, would, I think, be reasonably consistent with the evidence of Mr. Lashmar and Messrs. Gaudion and Lee. For example, the two last-named witnesses would see the *Olympic* steady before the *Hawke* came in sight. Even if the two vessels were bridge to bridge, there would appear to be a gap between them. This gap would close rapidly if, as there is every reason to suppose, the speed of the *Hawke* at first exceeded the speed of the *Olympic*, and the *Hawke* would appear to creep up the side of the *Olympic* till it may be that they seemed almost bridge to bridge. As soon as the *Olympic's* speed exceeded to any considerable extent the speed of the *Hawke*, the latter would appear to drop behind. This is precisely what these witnesses say they saw, the *Olympic* appearing to be gaining on the *Hawke* for the first time shortly before the latter commenced her swerve. This would also bring the two vessels within a cable's length of each other just before the swerve commenced. It is to be observed that on this course the *Hawke's* speed would have to be reduced below 15 knots to bring her two points abaft the *Olympic's* beam when the latter steadied, and such reduction of speed would be quite inconsistent with her having reached the point of collision in the six minutes available.

For the reasons above given I have come to the conclusion that the *Hawke* was never at any material time two points abaft the *Olympic's* beam and was not therefore the overtaking vessel.

I next come to the question whether the two vessels were crossing vessels within the meaning of the rule. As I have already said, I think on the evidence it must be taken that when the *Olympic* steadied on her S. 59° E. course the *Hawke* was already on a course of S. 74° E. These courses therefore were approaching each other at an angle of 15 degrees, and would ultimately intersect. In my opinion there was from the very first a risk of collision if both vessels persisted in these courses; such risk would be quite manifest at any rate before the vessels were off the Chequers Buoy. It was therefore the business of

the *Olympic*, which had the *Hawke* on her starboard side, to keep out of the way, unless the circumstances were such that those in charge of the *Olympic* could reasonably infer that the *Hawke's* course was for the south channel, and that before any actual danger could arise she might be expected to port her helm to such a degree as would obviate all risk: see *The Pekin.* (1) It was suggested that the circumstances were such that those in charge of the *Olympic* might reasonably suppose that the *Hawke* was going south of Ryde Middle and would therefore port her helm before any actual danger arose. Captain Blunt said that his course S. 74° E. was a perfectly good course either for the channel north or the channel south of Ryde Middle. If this be so, and we are advised by our assessors that it is so, the *Olympic* could have had no justification for thinking that the *Hawke* would at any material time port her helm. Further, we are advised that in any case the *Olympic* could not reasonably expect that the *Hawke* following the normal method of navigation for the south channel, and being within a cable of the Cowes buoys, would port her helm until the Old Castle Buoy was clear of the West Conical Buoy, and we know that she did in fact port her helm as soon as that moment arrived, and that her so doing did not avert a collision. Moreover, the *Hawke*, when she ported, had a little over four cables to cover before her course crossed that of the *Olympic*, and if, as I think is the effect of the evidence, the vessels were then bridge to bridge, it could have been by no means certain (quite apart from all possible interaction between the two vessels) that the *Olympic* would get clear of the *Hawke* if both vessels persisted on their respective courses. The risk of collision was therefore imminent before the *Hawke* ported her helm, and before it could have been reasonably expected that she would port. There is nothing, therefore, to take the case out of the crossing rule. A vessel which under the crossing rule has to keep out of the way of another vessel must act before there be actual danger. If she allows the time for acting to go by, she may lead the other vessel to suppose that she cannot or does not intend to act. In such a case the latter vessel may be relieved from the reciprocal obligation of maintaining her own course and

(1) [1897] A. C. 532.

C. A. 1913

THE OLYMPIC AND H.M.S. HAWKE.

Lord Parker of Waddington.

speed. I accept Captain Blunt's evidence that he ported as soon as the Old Castle Buoy was clear, because he felt uncomfortable at the close proximity of the *Olympic*, and I think under the circumstances he was justified in so doing, though the cases are not quite consistent on the point. At any rate, it is I think quite impossible to suggest that the *Hawke's* action in porting was, apart from the rules, in any way a breach of good seamanship or in any way contributed to the causes of the collision. The *Hawke* being a King's ship cannot therefore be held liable for porting her helm when she did.

It remains to consider the conduct of the *Hawke* after she commenced her swerve against a port helm. Captain Blunt's first order was "Hard-a-port." This was carried out to 15 degrees of port where the helm jammed. His second order, given before he knew that the helm had jammed, was "Stop the port engine and full astern the starboard engine"; and his third order, immediately afterwards when he knew the helm had jammed, was "Full astern both engines." It was contended in argument that the *Hawke* would be responsible for all results of the jamming of her helm unless she could explain it by inevitable accident, and the case of *The Merchant Prince* (1) was cited in support of the argument. That case in effect decides that a vessel against which there is a presumption of negligence cannot rebut the presumption by pleading the inefficiency of her own appliances unless she shew that such inefficiency was due to inevitable accident. In the present case, if, as I think, the vessels were crossing vessels within the rule, there could be no presumption of negligence against the *Hawke*. To raise such a presumption the *Olympic* would at least have to shew that if the *Hawke's* helm had been put and kept hard-a-port the collision would probably have been avoided. There is, I think, no evidence of this, and even if there were, I am not satisfied that the *Hawke* ought to be blamed for what she did or omitted to do in the agony of the impending collision: see *The Mary*. (2) The same considerations apply to the contention that the *Hawke* was to blame for not manœuvring her engines in a manner different from that in which they were in fact manœuvred.

(1) [1892] P. 179. (2) [1897] A. C. 351.

In my opinion, therefore, the *Olympic* was alone to blame for the collision. From the first the pilot seems to have misjudged the situation. He was aware of the presence of the *Hawke* in the channel, and appears to have made up his mind that the *Olympic* would come round into the channel far ahead of her. In this he entirely misjudged either the relative speeds of the two vessels or their distance from each other. His first error no doubt contributed to a second and more serious mistake. When the *Olympic* steadied on her course he entirely misjudged the bearing of the *Hawke*. He thought she was well abaft the beam, and therefore paid very little attention to her, it being on that footing her business to keep out of the way. He also misjudged his own position in the channel, which was in fact much more to the south than he supposed. He further misjudged the *Hawke's* course thinking it a parallel, whereas it was in fact a converging, course. He thus failed to realize his duty to keep out of the way. Even when the *Hawke* commenced her swerve he delayed action till too late.

The decision of the Court below was, I think, right, and, notwithstanding the new evidence, ought in my opinion to be affirmed.

Appeals dismissed with costs, except the costs of the appeal so far as increased by the hearing of the evidence as to the place of wreckage, in respect of which each party to bear their own costs.

Solicitors for the owners of the steamship *Olympic : Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for the Admiralty : *The Treasury Solicitor.*

T. L. M.

THE END.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1913, will be as follows:—

In the First Series,
[1913] 1 Ch. [1913] 2 Ch.

In the Second Series,
[1913] 1 K. B. [1913] 2 K. B. [1913] 3 K. B. [1913] P.

In the Third Series,
[1913] A. C.

INDEX.

ADMINISTRATION — *Outstanding Grant — Letters of Administration not forthcoming—Lost or destroyed—Additional Estate—Retractation of Renunciation—Fresh Grant to Person entitled—Practice as to Form of all Grants in future.*

In future, all grants of letters of administration are to contain a personal undertaking by the administrator that the document shall be brought into the Principal Probate Registry if and whenever the administrator shall receive a formal notification that this is required to be done.

The deceased, a married woman, died in 1888 intestate, leaving her husband and one child surviving.

In May, 1889, the husband was adjudicated bankrupt, and in June, 1889, he renounced his right to take out letters of administration in respect of his deceased wife's estate.

In October, 1889, a grant of letters of administration was made to his trustee in bankruptcy.

In March, 1891, the bankruptcy was annulled, on payment by the bankrupt of 20*s.* in the pound.

In May, 1891, the trustee in the bankruptcy obtained his release as such trustee.

More than twenty years afterwards, a sum of about 700*l.* in personalty became payable to the legal personal representative of the deceased, and inquiries by the husband, who was beneficially entitled to this sum, and by his solicitor, elicited that the outstanding letters of administration could not be found, and that the same had been handed by the administrator to the official receiver in bankruptcy who succeeded him in that office, and the latter stated that the same must have been destroyed with the file of the bankruptcy proceedings.

On a motion by the husband for leave to retract his renunciation, for revocation of the outstanding grant, and for a fresh grant of letters of administration to himself:—

The Court, in making the order, directed that in future every grant of letters of administration, whether issued to a person in his official capacity, or otherwise, shall contain a personal undertaking by the grantee that the letters of

ADMINISTRATION—*continued.*
administration shall be brought into and lodged in the Principal Probate Registry, upon formal notification being given to the grantee at any time that this is required to be done. IN THE ESTATE OF HEATHCOTE - **Bargrave Deane J. 42**

—— Probate.
See under PROBATE.

ADMIRALTY.
See under SHIPPING.

ADULTERY—Divorce.
See under DIVORCE.

ALLOWANCE—Nullity suit — Cross-claims for relief—Decree—Allowance for de facto wife - - - - - - - **160**
See DIVORCE. 10.

—— Practice — Petition for permanent maintenance of petitioner and allowance for children - - - - - - **138**
See DIVORCE. 11.

APPEAL—Clergy Discipline Act, 1892, Criminal suit under—Appeal in matter of law—Remission of cause—Practice—Costs
See ECCLESIASTICAL LAW. 2. **184**

—— Divorce—Desertion—Appeal from justices — Second summons — Res judicata — Wife's costs - - - - - **9**
See DIVORCE. 3.

APPOINTMENT—Power of.
See under POWER OF APPOINTMENT.

ARBITRATION—Ship—Bill of lading—Damage to goods — Jurisdiction — Arbitration clause - - - - - - - **130**
See SHIPPING. 9.

BAILEE — Ship — Collision — Damage — Time charter—Sub-charter—Claim for bill of lading freight - - - - - **173**
See SHIPPING. 2.

DIVORCE—*continued.*

at proceedings in the Divorce Court. The husband's solicitor answered, in effect, that, in consequence of the statements made, he was not prepared to enter into any arrangement.

No proceedings were taken in the Divorce Court, and no further step was taken until October, 1912, when a second summons at the instance of the wife was issued, the ground of complaint being alleged desertion by the husband, but without specifying a date.

This second summons came before a bench of nine justices in another town, and they, on October 14, 1912, after overruling an objection that the matter was res judicata, and after refusing an application for an adjournment to call rebutting evidence, found the cause of complaint proved, and ordered the husband to pay 10*s.* a week for the maintenance of his wife, together with a sum for costs :—

Held, on appeal, that the order was wrong and must be rescinded ; that the objection which the justices had overruled was good ; that the matter was res judicata ; that there was, neither in fact nor in law, any desertion of the wife by the husband ; and, upon the question of costs, that the wife must bear her own, both in the Divisional Court and in the Court below. BLACKLEDGE *v.* BLACKLEDGE - **Div. Ct. 9**

—— Domicil—Foreign domicil.
See No. 5, below.

4. —— *Domicil—Separate Domicil of Wife—Jurisdiction—Decree.*

A woman, domiciled in England at the time of her marriage with a foreigner, may—after he has debarred her from claiming any relief in the Courts of his foreign domicil by obtaining there a decree of nullity—petition the Court of her own domicil, to which she has reverted, and may obtain a decree here dissolving her marriage.

In proper circumstances, the Court here ought to assume jurisdiction in the wife's suit for dissolution of marriage, by treating her as having a domicil of her own sufficient to support such a suit.

The dicta of Lord Gorell in *Ogden* v. *Ogden* (*otherwise Philip*) [1908] P. 46, at pp. 82, 83, adopted. STATHATOS *v.* STATHATOS
Bargrave Deane J. 46
See next case.

5. —— *Foreign Domicil of Husband — Separate Domicil of Wife — Jurisdiction — Decree.*

The rule or theory of law that the domicil of the husband governs the jurisdiction in suits for dissolution of marriage, as distinguished from other matrimonial suits, may be departed from in proper circumstances.

Where a husband or the parents of a husband domiciled abroad has or have obtained a decree of nullity in the Court of his foreign domicil, and the wife, whose domicil was in England, is thus debarred from obtaining relief in the foreign Court, she may be treated as having a domicil of her own sufficient to give the English Court

DIVORCE—*continued.*

jurisdiction to entertain a suit by her for dissolution of the marriage.

The dicta of Lord Gorell in *Ogden* v. *Ogden* (*otherwise Philip*) [1908] P. 46, at pp. 82, 83, adopted.

Stathatos v. *Stathatos* [1913] P. 46, approved. DE MONTAIGU *v.* DE MONTAIGU
Samuel Evans, Pres. 154

6. —— *Foreign Marriage—Evidence—Practice—Former Petition and Decree of Restitution of Conjugal Rights—Formal Proof of Marriage in that Suit—Subsequent Petition for Dissolution—No Fresh Proof of Marriage required.*

The proof of a marriage in a suit for restitution of conjugal rights is sufficient, without further proof, in a subsequent divorce suit between the same parties, unless the validity of the marriage is put in issue. COWLEY *v.* COWLEY - - **Samuel Evans, Pres. 159**

—— Judicial separation—Wife's petition for—Answer by husband alleging adultery and claiming damages—Pleadings.
See No. 12, below.

7. —— *Maintenance — Permanent Maintenance—Injunction—No Subsisting Order—Practice.*

The Court, upon a petition for permanent maintenance, and before any specific sum has been made payable by a subsisting order, has no power to grant an injunction, at the instance of a wife, restraining her husband from dealing with his property which may ultimately be affected under a petition for permanent maintenance ; and the same principle applies to an application for permanent alimony.

Newton v. *Newton* (1885) 11 P. D. 11, explained and followed.

Noakes v. *Noakes and Hill* (1877) 4 P. D 60, discussed. BURMESTER *v.* BURMESTER
Samuel Evans, Pres. 76

—— Maintenance—Practice—Decree nisi—Petition for permanent maintenance of petitioner and allowance for children—Inquiry and report.
See No. 11, below.

8. —— *Nullity—Void Marriage—Bigamy—Decree Nisi—Delay in applying for Decree Absolute.*

A decree nisi can be made absolute notwithstanding a long delay, when the delay is explained, and especially in a case where, if the petition were dismissed, the petitioner would, as of right, be entitled to a decree on filing a fresh petition on the same ground and on proving the same facts, and would also, in due course, be entitled to have the decree made absolute. GRANT (FALSELY CALLED GIANNETTI) *v.* GIANNETTI - - **Samuel Evans, Pres. 137**

9. —— *Nullity of Marriage—Wilful and Persistent Refusal to allow Marital Intercourse—Decree.*

Wilful and persistent refusal to allow any marital intercourse is a sufficient ground for a decree of nullity of marriage.

DIVORCE—*continued.*

Where, upon a petition for nullity of marriage presented by the husband in good faith, it appeared that the consummation of the marriage had been prevented, after repeated attempts on his part, by the wilful, determined, steadfast refusal of the wife, and the refusal was threatened to be, or likely to be, persisted in, the Court (Sir Samuel Evans, President) held that this constituted a valid and sufficient ground for annulling the marriage. DICKINSON *v.* DICKINSON (OTHERWISE PHILLIPS)
Samuel Evans, Pres. 198

10. —— *Nullity Suit—Cross-Claims for Relief—Decree—Allowance for de facto Wife—Matrimonial Causes Act*, 1907 (7 *Edw.* 7, *c.* 12), *s.* 1.

The Matrimonial Causes Act, 1907, gives the Court power, in the exercise of its discretion in each particular case, to order the de facto husband to make an allowance to the de facto wife, after a decree of nullity of marriage, and, where security can be given, to order the whole or any part of such allowance to be secured. GULLAN *v.* GULLAN (OTHERWISE GOODWIN)
Samuel Evans, Pres. 160

11. —— *Practice—Decree Nisi—Petition for Permanent Maintenance of Petitioner and Allowance for Children—Inquiry and Report—Motion to confirm Report—Matrimonial Causes Act*, 1907 (7 *Edw.* 7, *c.* 12), *s.* 1, *sub-s.* 2—*Decree not yet made absolute—Order, nunc pro tunc.*

The Court has power, under s. 1 of the Matrimonial Causes Act, 1907, before a decree nisi for dissolution of marriage has been made absolute, to confirm the report of the registrar recommending maintenance for the wife, and to order the husband to pay, after the decree shall have been made absolute, the amount of maintenance by monthly or weekly sums. CAVENDISH *v.* CAVENDISH - - **Samuel Evans, Pres. 138**

12. —— *Practice—Pleading—Wife's Petition for Judicial Separation—Answer by Husband alleging Adultery and claiming Damages.*

A husband, in answer to his wife's petition for judicial separation, which he resists on the ground of her adultery, may claim damages against the alleged adulterer. A separate petition is not necessary.

An answer in this form having been rejected in the Divorce Registry, the judge in chambers, upon an ex parte application, directed the same to be accepted and filed as originally tendered. N. *v.* N. - - **Samuel Evans, Pres. 75**

13. —— *Practice—Pleadings—Wife's Petition for Restitution of Conjugal Rights—Answer alleging Wife's Adultery — Reply alleging Husband's Adultery—Par delictum—Compensatio Criminis—Irrelevance—Striking out.*

In answer to a wife's petition for restitution of conjugal rights a husband alleged that the wife had committed adultery, but he asked for no relief. The wife replied denying her adultery, and alleging that the husband himself had been guilty of that offence :—

Held by Bargrave Deane J. and by the Court of Appeal that, having regard to the statutory

DIVORCE—*continued.*

changes effected by the Matrimonial Causes Acts, 1857 and 1884, the decision in *Seaver* v. *Seaver* (1846) 2 Sw. & Tr. 665 (Appendix II.), that where both husband and wife had committed adultery, and neither could therefore obtain a divorce a mensa et thoro from the other, yet the wife was entitled to a decree for restitution, no longer applied to English divorce law.

Held, therefore, that the wife's recrimination of adultery was irrelevant and must be struck out from her reply.

Decision of Bargrave Deane J. affirmed.

The view expressed in *Russell* v. *Russell* [1895] P. 315, followed. *Seaver* v. *Seaver* overruled. BROOKING-PHILLIPS *v.* BROOKING-PHILLIPS - - - - - - **C. A. 80**

14. —— *Separation Deed.*

A separation deed whereby husband and wife agree not to institute proceedings in respect of past matrimonial offences, and containing an express condonation of such offences, being valid, the clauses in such deed must be interpreted according to the ordinary rules of construction.

A husband and wife entered into a deed of separation, whereby (inter alia) they expressly and mutually agreed that any matrimonial offences which might have been committed by either of them before the execution of the deed were thereby condoned ; but, by a subsequent clause, it was agreed (inter alia) that if the marriage should be dissolved or if the parties should be judicially separated by reason of any misconduct occurring after the date of the deed, then all the covenants and provisions contained in the deed should become void.

The husband had been guilty of cruelty and adultery before the date of the deed, and it was proved that he had been guilty of adultery after the date of the deed :—

Held, that although it was doubtful whether the subsequent adultery revived, either by virtue of or apart from the deed, the offences which by the deed had been expressly condoned, yet, inasmuch as the subsequent adultery of the husband would entitle the wife to a judicial separation, and, thereupon, the covenants in the deed, including the condonation clause, would become void, and she might then in a subsequent proceeding obtain a dissolution of marriage, the Court would not put her to such a circuitous mode of obtaining relief as would thereby be involved, but would at once grant a decree nisi dissolving the marriage.

Dowling v. *Dowling* [1898] P. 228, doubted but followed. BOURNE *v.* BOURNE.
Samuel Evans, Pres. 164

15. —— *Settlement, Variation of—No Power of Appointment in Favour of Petitioner's Future Wife and Children of Future Marriage—Interest of Child of Dissolved Marriage.*

Where, under a marriage which had been dissolved, no power had been given, by the terms of the marriage settlement, to the innocent party if survivor to appoint a portion of the settled fund in favour of a future spouse and the children by any future marriage, the Court, in varying such a settlement, may, although issue

DIVORCE—*continued.*
of the dissolved marriage survive, give power to make such an appointment, and in the lifetime of the guilty party, to an extent having due regard to the facts, not detrimental to the interests of such issue. ATKINS *v.* ATKINS AND URQUHART - - **Samuel Evans, Pres. 211**

DOMICIL—Divorce—Separate domicil of wife—Jurisdiction—Decree - - **46**
See DIVORCE. 4.

—— Foreign domicil of husband — Separate domicil of wife—Jurisdiction—Decree
See DIVORCE. 5. **154**

ECCLESIASTICAL FEES—Tables of Ecclesiastical Fees, *London Gazette*, March 19, 1869, and June 2, 1908—Canons 86 and 125 of Canons of 1603 - - - **21**
See ECCLESIASTICAL LAW. 1.

ECCLESIASTICAL LAW—*Civil Suit—Procurations — Claim for Procurations by Archdeacon holding Visitation outside Limits of Defendant's Parish—26 Hen. 8, c. 3 — Ecclesiastical Fees Act*, 1867 (30 & 31 *Vict. c.* 135)—*Tables of Ecclesiastical Fees, London Gazette, March* 19, 1869, *and June* 2, 1908—*Canons* 86 *and* 125 *of Canons of* 1603.

Except in those archdeaconries where by arrangement with the Ecclesiastical Commissioners procurations in respect of archidiaconal procurations are not required to be paid by the clergy, the incumbents of parishes cited to attend the annual visitation of the archdeacon within whose jurisdiction their benefices are situated, if not otherwise exempt, are legally bound to pay procurations to the archdeacon at the customary rate, notwithstanding that the archdeacon has not personally visited the parish in respect of which the procurations are claimed either personally or by deputy, and although the visitation is held in another parish or in the cathedral of the diocese and for a number of parishes collectively.

The Archdeacon of Exeter claimed in a civil suit brought against the incumbent of a parish within his archdeaconry a procuration of ten shillings in respect of his annual visitation in that year held for a number of parishes within the archdeaconry, including the defendant's parish, on May 8, 1911, in a parish of which the defendant was not the incumbent and in the cathedral of the diocese. The defendant was cited to attend the visitation, but did not appear at it or pay the sum claimed from him. At the hearing it appeared that no arrangement had been made with the Ecclesiastical Commissioners under which procurations in respect of the archdeacon's visitation would not be required to be paid, and that ten shillings was the amount at which the procurations in kind formerly payable to the archdeacon in respect of the defendant's parish had been commuted :—

Held, that the defendant was legally liable to pay to the promovent the customary procuration of ten shillings due and payable to him as archdeacon in respect of his visitation in 1911 notwithstanding that the archdeacon had not

ECCLESIASTICAL LAW—*continued.*
visited the defendant's parish either personally or by deputy, but had held his visitation outside the defendant's parish and for a number of parishes at one and the same time.

Held, also, that the Ecclesiastical Fees Act, 1867, and the tables of fees thereunder afforded no defence to the suit, as the fees under that Act so far as they relate to visitations are confined to fees payable by the churchwardens of parishes in cases where they have funds to pay them, and are not fees which affect, or are substituted for, procurations payable by the incumbents of parishes.

The Court ordered that as long as the defendant remained beneficed in the benefice of which he was incumbent at the date of the judgment in the suit he should pay to the Archdeacon of Exeter for the time being the annual sum of ten shillings in respect of procurations due and payable by him to the archdeacon in respect of the archidiaconal visitations from and inclusive of the year 1912 and onwards. THE ARCHDEACON OF EXETER *v.* GREEN - **Consistory Court of Exeter 21**

2. —— *Jurisdiction — Criminal Suit under Clergy Discipline Act*, 1892 (55 & 56 *Vict. c.* 32) —*Appeal in Matter of Law—Clergy Discipline Act*, 1892 (55 & 56 *Vict. c.* 32), *ss.* 2, 12, 13—*Immoral Act—Offence against the Laws Ecclesiastical being an Offence against Morality and not being a Question of Doctrine or Ritual—Canons of* 1603, *Canons* 75 *and* 109—*Writing and sending by a Married Clergyman of an Obscene and Indecent Letter to an Unmarried Woman — Offence justiciable under Clergy Discipline Act*, 1892 — *Remission of Cause — Clergy Discipline Act Rules*, 1892, *rr.* 72, 95—*Practice—Costs.*

It is provided inter alia by the 2nd section of the Clergy Discipline Act, 1892, that if any clergyman, defined by the 12th section of the same Act to mean, unless the context otherwise requires, a clergyman not being the bishop of a diocese who is in holy orders of the Church of England, is alleged to have been guilty of an immoral act, immoral conduct, or immoral habit, or of any offence against the laws ecclesiastical being an offence against morality and not being a question of doctrine or ritual, he may be prosecuted by the bishop of the diocese and tried in the Consistory Court of the diocese in which he holds preferment in accordance with the prescribed procedure subject as in the same section mentioned, whilst the 5th section of the same Act provides that a complaint under the Act for an offence shall not be made after five years from the date of the offence or of the last of a series of acts alleged as part of the offence, with an exception in cases of conviction by a temporal Court.

The incumbent of a parish—a married man—was charged in a criminal suit instituted under the Clergy Discipline Act, 1892, with having within five years then last past been guilty of immoral acts, immoral conduct, and of offences against the laws ecclesiastical being offences against morality in that he wrote and sent by post addressed to A. B., an unmarried woman, then or lately a parishioner of and resident in

ECCLESIASTICAL LAW—*continued.*
the parish, an obscene and indecent letter. The defendant appeared in the suit and brought in a defence which, after admitting and deeply regretting the writing of the letter and pleading that at the time the defendant wrote it he had not had control over his feelings and was unable to appreciate the meaning of what he was writing, submitted that the letter was not in itself sufficient to constitute an offence under the Clergy Discipline Act, 1892. At the hearing of the suit in the Consistory Court of the diocese in which the defendant held preferment evidence in support of the charge was given by witnesses for the prosecutor, but the judge of the Consistory Court after hearing arguments, without any evidence having been adduced on behalf of the defendant, dismissed the prosecution on the ground that the charge was not one maintainable under the Clergy Discipline Act, 1892. The prosecutor appealed to the Arches Court of Canterbury:—

Held, that the act charged against the defendant was "an immoral act" within the meaning of those words in the 2nd section of the Clergy Discipline Act, 1892, and constituted an offence justiciable under that Act.

Held, also, that, assuming the act charged against the defendant was one for which he might have been prosecuted in a temporal Court, the fact that no such prosecution had taken place would not have been a bar to the proceedings in the Court below.

The writing and sending by a married clergyman of an obscene and indecent letter to an unmarried woman is an offence for which the clergyman can be tried under the 2nd section of the Clergy Discipline Act, 1892, within five years of the date of the offence.

Observations as to the procedure to be followed in cases where the dismissal of a prosecution under the Clergy Discipline Act, 1892, is claimed on the ground that the charges under that Act are not maintainable in respect of matter of law. BISHOP OF ELY *v.* CLOSE
Arches Court of Canterbury 184

EVIDENCE—Divorce—Foreign marriage - 159
See DIVORCE. 6.

Ship — Collision — Overtaking and overtaken vessels—Crossing vessels—Suction or interaction—"Swerve"—Admission of further evidence - - 214
See SHIPPING. 5.

FEES—Ecclesiastical fees - - - - 21
See ECCLESIASTICAL LAW. 1.

FOG—Collision—"Moderate" speed - 70
See SHIPPING. 4.

FOREIGN DOMICIL — of husband — Separate domicil of wife—Jurisdiction—Decree
See DIVORCE. 5. 154

FOREIGN MARRIAGE — Evidence — Former petition and decree of restitution of conjugal rights—Formal proof of marriage in that suit—Subsequent petition for dissolution—No fresh proof of marriage required - - - - 159
See DIVORCE. 6.

FREIGHT — Ship — Collision — Damage—Time charter—Sub-charter — Bailee — Claim for bill of lading freight - - 173
See SHIPPING. 2.

—— Ship—Collision—Damage—Time charter—Sub-charter — Loss of bill of lading freight - - - - - - 54
See SHIPPING. 3.

GRANT OF ADMINISTRATION.
See under ADMINISTRATION.

HUMBER — Ship — Collision — Compulsory pilotage—Exemption—Putting into the Humber for "stores" only — Bunker coal - - - - - - - 1
See SHIPPING. 1.

HUSBAND AND WIFE—*Deed of Separation—Covenant not to sue for Restitution of Conjugal Rights—Bankruptcy of Husband—Arrears of Allowance under Deed proved for by Wife—Discharge—Effect—Petition for Restitution of Conjugal Rights—Decree.*

The annual sum payable to a wife under a separation deed being provable in the husband's bankruptcy, but no action being maintainable against the husband, after he has obtained his discharge, under his covenant to pay the allowance specified in the deed, the deed is no bar to proceedings for restitution of conjugal rights subsequently instituted by the wife. MCQUIBAN *v.* MCQUIBAN
Samuel Evans, Pres. 208

—— Divorce.
See under DIVORCE.

—— Probate — Practice — Two persons dying together — Survivorship — Wills — Probate, or administration with will annexed—Form of oath to lead grants 6
See PROBATE.

IMMORAL ACT — Criminal suit under Clergy Discipline Act, 1892—Appeal in matter of law - - - - - - 184
See ECCLESIASTICAL LAW. 2.

INDEMNITY—Shipping—Collision—Towage — Damage to cargo—Indemnity claimed from third party — Construction of contract—Implied term - - 13
See SHIPPING. 8.

INJUNCTION—Divorce — Permanent maintenance—No subsisting order—Practice
See DIVORCE. 7. 76

JUDICIAL SEPARATION—Wife's petition for — Practice — Pleading — Answer by husband alleging adultery and claiming damages - - - - - - 75
See DIVORCE. 12.

JURISDICTION — Divorce — Desertion — Practice—Appeal from justices—Second summons—Res judicata—Wife's costs
See DIVORCE. 3. 9

JURISDICTION—*continued.*

—— Divorce—Foreign domicil of husband—Separate domicil of wife—Decree 154
See DIVORCE. 5.

—— Ecclesiastical law — Criminal suit under Clergy Discipline Act, 1892—Appeal in matter of law - - - - - 184
See ECCLESIASTICAL LAW. 2.

—— Ship—Damage to goods—Bill of lading—Arbitration clause - - - 130
See SHIPPING. 9.

JUSTICES—Desertion—Practice—Appeal from justices—Second summons—Res judicata—Wife's costs - - - - 9
See DIVORCE. 3.

LETTERS OF ADMINISTRATION.
See under ADMINISTRATION.

MAINTENANCE—Divorce — Practice — Decree nisi—Petition for permanent maintenance of petitioner and allowances for children—Inquiry and report—Motion to confirm report - - - - 138
See DIVORCE. 11.

—— Practice — Permanent maintenance — Injunction—No subsisting order - 76
See DIVORCE. 7.

MARRIAGE—Divorce.
See under DIVORCE.

—— Nullity of marriage.
See under DIVORCE.

MARRIED WOMAN—Divorce.
See under DIVORCE.

MARRIED WOMEN'S PROPERTY ACT, 1893, s. 2 - - - - - - - 119
See DIVORCE. 2

MATRIMONIAL CAUSES ACTS.
See under DIVORCE.

MERCHANT SHIPPING.
See under SHIPPING.

"MODERATE" SPEED—Collision—Fog - 70
See SHIPPING. 4.

NULLITY OF MARRIAGE—Nullity suit—Cross-claims for relief—Decree—Allowance for de facto wife - - - - 160
See DIVORCE. 9.

—— Void marriage — Bigamy — Decree nisi — Delay in applying for decree absolute
See DIVORCE. 7. 137

—— Wilful and persistent refusal to allow marital intercourse—Decree - 198
See DIVORCE. 8.

PILOTAGE — Ship — Collision — Compulsory pilotage—Exemption—Putting into the Humber for "stores" only — Bunker coal - - - - - - - 1
See SHIPPING. 1.

PLEADINGS—Divorce.
See under DIVORCE.

POWER OF APPOINTMENT—Divorce—Variation of settlement—No power of appointment in favour of petitioner's future wife and children of future marriage—Interest of child of dissolved marriage - - - - - - 211
See DIVORCE. 15.

PRACTICE—Divorce.
See under DIVORCE.

PROBATE — *Practice — Two Persons dying together — Survivorship — Husband and Wife—Wills—Probate, or Administration with Will annexed—Form of Oath to lead Grants.*

Where there is no evidence, or where it is clear that there is not sufficient evidence, of survivorship, in cases of husband and wife dying at the same time, the practice in future will be to apply in the Principal Probate Registry, and not, as heretofore, by motion to the Court, for grants and for leave to vary the usual form of oath.

Where, however, there is any doubt as to survivorship, the registrar will refer the case to the Court, to be dealt with on motion. IN THE ESTATE OF ROBY - **Bargrave Deane J.** 6

—— Administration—Outstanding grant—Letters of administration not forthcoming—Lost or destroyed—Additional estate
See ADMINISTRATION. 42

PROCURATIONS — Claim for procurations by archdeacon holding visitation outside limits of defendant's parish - - 21
See ECCLESIASTICAL LAW. 1.

PROOF—Bankruptcy.
See under BANKRUPTCY.

QUANTUM MERUIT—Ship—Salvage—Towage—Abandoned vessel—Derelict—Conditions substituting salvage for towage
See SHIPPING. 10. 141

REFUSAL—Nullity of marriage—Wilful and persistent refusal to allow marital intercourse—Decree - - - 198
See DIVORCE. 9.

REMISSION OF CAUSE—Clergy Discipline Act, 1892, Criminal suit under—Appeal in matter of law—Practice—Costs—Immoral act - - - - - 184
See ECCLESIASTICAL LAW. 2.

RENUNCIATION—Outstanding grant—Letters of administration not forthcoming—Lost or destroyed—Additional estate—Retractation of renunciation - - 42
See ADMINISTRATION.

RES JUDICATA—Divorce—Desertion—Appeal from justices — Second summons — Wife's costs - - - - - - 9
See DIVORCE. 3.

RESTITUTION OF CONJUGAL RIGHTS—Deed of separation—Covenant not to sue for restitution of conjugal rights—Bankruptcy of husband—Arrears of allowance under deed proved for by wife—Discharge—Effect - - - **208**
See HUSBAND AND WIFE.

—— Former petition and decree of—Practice—Foreign marriage—Evidence—Subsequent petition for dissolution—No fresh proof of marriage required - - **159**
See DIVORCE. 6.

—— Wife's petition for—Answer alleging wife's adultery — Reply alleging husband's adultery—Irrelevance—Striking out
See DIVORCE. 13. **80**

RESTRAINT ON ANTICIPATION—Divorce—Costs—Married woman—Separate property - - - - - - **119**
See DIVORCE. 2.

SALVAGE—Ship—Towage—Abandoned vessel—Derelict—Quantum meruit—Conditions substituting salvage for towage
See SHIPPING. 10. **141**

SEAMEN—Wages—"Wreck" - - - **92**
See SHIPPING. 11.

SEPARATION, DEED OF—Covenant not to sue for restitution of conjugal rights—Bankruptcy of husband—Arrears of allowance under deed proved for by wife—Discharge—Effect - - **208**
See HUSBAND AND WIFE.

—— Divorce - - - - - - **164**
See DIVORCE. 14.

SETTLEMENT—Variation of—Divorce—No power of appointment in favour of petitioner's future wife and children of future marriage—Interest of child of dissolved marriage - - - **211**
See DIVORCE. 15.

SHIPPING—*Collision*——*Compulsory Pilotage—Exemption—Putting into the Humber for "Stores" only—Bunker Coal*—2 & 3 *Will.* 4, *c. cv.* (*Local Act*), *s.* 24.

The defendants' steamship, whilst on a voyage from Great Yarmouth to a Russian port with a cargo of herrings, put into the Humber for the purpose of replenishing her stock of bunker coal, and came into collision with the plaintiffs' trawler. Both vessels were found to blame. The defendants set up a plea of compulsory pilotage:—

Held by the President (Sir Samuel Evans), that the defendants could not escape liability by reason of their vessel being in charge of a duly licensed pilot in a compulsory pilotage district, as the coals were "stores" within the meaning of s. 24 of the local Act 2 & 3 Will. 4, c. cv., by which "any ship or vessel putting into the river Humber for the purpose of shelter or of obtaining stores or provisions only" is exempt from compulsory pilotage. THE "NICOLAY BELOZWETOW" - **Samuel Evans, Pres. 1**

SHIPPING—*continued.*

2. —— *Collision—Damage—Time Charter—Sub-charter—Bailee—Claim for Bill of Lading Freight.*

The plaintiffs, sub-charterers of a steam vessel which sank with her cargo after collision with the defendants' vessel, sued the defendants for the bill of lading freight which (but for the negligence of those in charge of the defendants' vessel) they would have earned if the voyage of the chartered vessel had been completed. Bargrave Deane J. disallowed the claim ([1913] P. 54) on the ground that the charterers only used the vessel for the temporary purpose of a defined voyage, and that this voyage was conducted by the master and crew as the servants of the owners with whom the possession of the ship remained. The shipowners were, therefore, the carriers of the cargo:—

Held by the Court of Appeal (Vaughan Williams L.J., Buckley L.J., and Hamilton L.J.), reversing the decision of the Court below, that the plaintiffs had a sufficient possessory interest in ship and cargo to entitle them, as bailees, to maintain the action, the evidence, taken by the registrar under an order of the Court of Appeal, shewing that the contract of carriage was between the plaintiffs and the shippers of the cargo, the plaintiffs taking delivery of the goods from the shippers, putting them on board, and signing the bills of lading in their own name, and on their own behalf, as principals. THE "OKEHAMPTON" - - - - **C. A. 173**

3. —— *Collision—Damage—Time Charter—Sub-charter—Loss of Bill of Lading Freight.*

The plaintiffs were sub-charterers of a steam vessel which, whilst on a voyage from Valencia to Hamburg with cargo, came into collision with, and was sunk by, the defendants' steam vessel. The defendants admitted that the collision was caused by the negligent navigation of their vessel, and agreed to a reference to the registrar and merchants of the plaintiffs' claim consisting of two items, namely: (1.) the bill of lading freight payable at Hamburg, less hire of the vessel and expenses which would have been incurred had the voyage been completed, and (2.) bunker coal which would have been on board at Hamburg after completing the voyage.

The registrar allowed item No. 2, but disallowed item No. 1 on the ground that the claim was too remote. On appeal in respect of item No. 1:—

Held by Bargrave Deane J., that this item was properly disallowed, as, by the identical terms of the charter and sub-charter, though the sub-charterers had the use of the vessel for the voyage, the shipowners remained in possession by their servants the master and crew, and, therefore, the sub-charterers had no right of action against the defendants, who had paid the shipowners for loss of chartered freight, and as the shipowners had carried the goods for the sub-charterers, they alone were in a position to sue for the freight on behalf of the sub-charterers. THE "OKEHAMPTON"
Bargrave Deane J. 54

See also a report of *The "Amstelstroom"* as a note at pp. 68, 69, of the above case.

SHIPPING—*continued.*

4. —— *Collision—Fog—"Moderate" Speed—Regulations for Preventing Collisions at Sea, art.* 16.

As a general rule a steam vessel ought not to be going so fast in a fog that those in charge of her cannot pull up within the distance that they can see. THE "COUNSELLOR"

Bargrave Deane J. 70

5. —— *Collision—Overtaking and overtaken Vessels—Crossing Vessels—Suction or Interaction—"Swerve"—Regulations for Preventing Collisions at Sea, arts.* 19, 21, 24 — *Admission of Further Evidence.*

A large Atlantic liner outward bound from Southampton, when about to round the West Bramble Buoy, gave two short blasts of the whistle to indicate to one of His Majesty's cruisers, coming up the Solent, that she was starboarding in order to proceed by the eastern passage through the buoyed channel towards Spithead. The cruiser was, at the time, slightly on the starboard bow of the liner, over a mile distant, and, under port helm, was proceeding to round Egypt Point in the Isle of Wight in order to get into the same channel. Both vessels straightened on their courses, the liner S. 59° E., the cruiser S. 74° E., that is, on converging courses of 15 degrees, involving risk of collision, the liner having the cruiser on her starboard side. A few minutes later, when the vessels, practically parallel, were in shallow water, and distant some hundred yards from one another, the cruiser, through suction or interaction, or other uncontrollable cause, suddenly swerved towards the liner and a collision occurred.

On consideration of the courses of the two vessels, their speeds, their bearings, their distances, their helm actions, and especially the spot of collision, the Court below, in cross-actions of damage by collision, found that the cruiser was not, as alleged by the liner, an overtaking vessel bound, under the King's Regulations, equivalent to art. 24 of the regulations for preventing collisions at sea, to keep out of the way; and that the pilot compulsorily in charge of the liner had made too wide a sweep to the southward and was alone to blame for not keeping out of the way of the cruiser under the crossing rule (art. 19) of the same regulations.

The Court of Appeal subsequently gave leave to the owners of the liner to call evidence before an examiner, as to the finding of the forefoot of the cruiser and other wreckage, with a view to shewing that the collision did not take place at the spot fixed upon in the Court below, and, therefore, that the calculations based upon it, as to the relative positions of the two vessels, at the material time, were inaccurate:—

Held by the Court of Appeal (Vaughan Williams L.J., Kennedy L.J., and Lord Parker), that the appeal of the owners of the liner, and that of the Admiralty, must be dismissed, for though the finding of the wreckage tended to shew that the spot of collision, fixed upon by the Court below, was not quite accurate, this did not materially affect the correctness of the conclusions arrived at.

Per Vaughan Williams L.J.: The evidence as to the finding of the wreckage was admitted by the Court of Appeal on the ground that it was relevant and material to the decision of the action by the owners of the liner against the commander of the cruiser, and also because the Court was satisfied that the search for the wreckage was not postponed by the owners of the liner taking their chance of winning their case independently of any search for wreckage; but, in the result, the place where the wreckage was found could only be taken as approximately indicating the spot of the collision, because the Court was not satisfied that the forefoot of the cruiser was detached and fell off immediately on the happening of the collision.

Per Kennedy L.J.: In special circumstances, illustrated in the case of a winding river by *The Velocity* (1869) L. R. 3 P. C. 44, although two steam vessels, in a buoyed channel, are visibly approaching one another on converging courses, the rules of good seamanship, and not art. 19, may be held to regulate their respective duties towards each other, but this point, taken on behalf of the owners of the liner, did not apply in the present case, as the pilot of the liner could and should have obeyed the crossing rule.

Per Lord Parker: Witnesses were called on behalf of the cruiser to shew that the behaviour of the cruiser in coming round to port against a port helm might be accounted for by what was referred to as suction, but may possibly be better described as the interaction of two vessels moving through comparatively shallow water at great velocity and in great proximity. That there may at times be such interaction has already been recognized in admiralty cases; but the laws which govern it have been hitherto imperfectly investigated and are comparatively unknown. THE "OLYMPIC" AND H.M.S. "HAWKE" - - - - - **C. A. 214**

6. —— *Collision—Sound Signals for Vessels in sight of one another—"Directing my course"—Regulations for Preventing Collisions at Sea, art.* 28.

A steam vessel bound, under the regulations for preventing collisions at sea, to keep her course and speed, found herself so close to a steam vessel bound to give way, that a collision could not be avoided by the action of the other vessel alone. She, therefore, by reversing her engines and hard-a-porting, endeavoured to avoid the other vessel; but did not indicate her manœuvres by the appropriate sound signals required by art. 28:—

Held by the President (Sir Samuel Evans), that the omission to give the sound signals neither caused the collision, nor contributed to the casualty, and did not, in the circumstances, amount to a breach of the rule, as the words "I am directing my course to starboard" were not applicable to an attempt, at the last moment, to escape a collision. THE "TEMPUS"

Samuel Evans, Pres. 166

7. —— *Collision—Steam Vessel turning—Sound Signals—Thames By-laws,* 1898, *rr.* 40, 42.

A steam vessel turning round in the river,

SHIPPING—*continued.*

and giving the appropriate four-blast signal, under r. 40 of the Thames By-laws, 1898, is not required to give, in addition, three short blasts when, in the process of turning, her engines are going astern. THE "HARBERTON" **Samuel Evans, Pres. 149**

8. —— *Collision—Towage—Damage to Cargo—Indemnity claimed from Third Party—Construction of Contract—Implied Term.*

A laden barge whilst in tow of a tug was sunk in the Mersey in a collision with a steamship, and the owners of the cargo, so lost, commenced an action of damage against the steamship and the tug. Thereupon the tug owners brought in the owners of the barge as third parties, and, in respect of any sum to which they (the tug owners) might be liable to the cargo owners, claimed a declaration that they were entitled to be indemnified by the barge owners under the terms of a "towage requisition" by which the tug owners (the Manchester Ship Canal Company) were "not to be responsible or liable for damage or injury to any ship, vessel or craft, or the persons or goods on board any ship, vessel or craft, of which the company may undertake the towage or docking in the river Mersey, the Manchester Ship Canal and the Bridgewater Canals, or which may be piloted by any of their servants to or from any place in the river Mersey, the said Ship Canal and the said Bridgewater Canals, or for any loss sustained or liability incurred by any one by reason of such damage or injury, or for any loss or liability incurred in consequence of any such ship, vessel, or craft colliding with or otherwise damaging any other vessel or thing, or for any loss or liability of any kind whatsoever arising from the towing, docking or piloting whatever may be the cause or causes of such damage, injury, loss or liability, or under whatever circumstances such damage, injury, loss or liability may have happened or accrued, even though arising from or occasioned by the act, omission, incapacity, negligence or default, whether wilful or not, of the company's servants or agents or any other persons, or any defect, imperfection, or insufficiency of power in or any delay, stoppage or slackness of speed of any tug or vessel, her machinery or equipment engaged in towing or docking any ship, vessel or craft, whether such defect, imperfection or insufficiency of power be in existence at the beginning of or during the said towing or docking."

On the hearing of the issue as between the tug owners and the barge owners :—

Held by the President (Sir Samuel Evans), that the third parties, the owners of the barge, were entitled to be dismissed from the action with costs, as no such liability by the third parties, namely, the owners of the barge, to indemnify the owners of the tug, could be implied from the terms of the towage requisition. THE "DEVONSHIRE" AND "ST. WINIFRED" **Samuel Evans, Pres. 13**

9. —— *Damage to Goods—"Carried into any port in England"—Jurisdiction—Bill of Lading—Arbitration Clause—Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 6—*Arbitration Act*, 1889 (52 *& 53 Vict. c.* 49), *s.* 4.

The plaintiffs, under a bill of lading, giving liberty to call at intermediate ports, and providing that any disputes as to its interpretation were "to be decided in Hamburg according to German law," shipped, at Hamburg, on board a German steam vessel, owned by the defendants, ten cases of gold coin, for delivery to the order of the plaintiffs at Monto Video or Buenos Aires. The vessel called at Southampton on the way out, and on her arrival at Monte Video only nine of the cases were delivered. On the return voyage to Hamburg the vessel again put into Southampton, where she was arrested on behalf of the plaintiffs in an action for breach of contract or duty in respect of the missing case. On objection by the defendants to the jurisdiction of the English Court :—

Held by the President (Sir Samuel Evans), that under the words "goods carried into any port in England" in s. 6 of the Admiralty Court Act, 1861, the Court had jurisdiction to arrest the vessel and entertain the action ; but that the proceedings must be stayed in order that the parties might litigate in Germany, as the clause in the bill of lading (set out above) amounted to a submission within the meaning of s. 4 of the Arbitration Act, 1889. The plaintiffs appealed against the order to stay :—

The Court of Appeal (Cozens-Hardy M.R. and Kennedy L.J.) allowed the plaintiffs to withdraw the appeal on the defendants undertaking to waive a clause in the bill of lading rendering proceedings in Germany out of time. THE "CAP BLANCO" - - - **C. A. 130**

10. —— *Salvage — Towage — Abandoned Vessel—Derelict—Quantum meruit—Conditions substituting Salvage for Towage.*

The plaintiffs contracted for the sum of 400*l.* to tow the defendants' rudderless steamship from Vigo to the Tyne "no cure no pay, no claim to be made for salvage." Whilst the towage was proceeding the master and crew of the steamship left her, and the tug, with other assistance, took the steamship first to Falmouth and then on to the Tyne :—

Held by the President (Sir Samuel Evans), that the contract was to tow, with the assistance of another tug, from Vigo to the Tyne, a partially disabled vessel, with her master and crew on board ; that the contract came to an end through the fault of those in charge of the steamship, for though the vessel was not technically a derelict, as the tug was in attendance under contract, still as the master and crew, without sufficient justification, had abandoned her, from that time the services rendered by the tug were not performed under contract but were in the nature of salvage for which, on a value of 11,711*l.*, the award would be 1400*l.*, and, on the basis of a quantum meruit, 800*l.* for the previous services. THE "GLENMORVEN" - **Samuel Evans, Pres. 141**

11. —— *Seamen—Wages—"Wreck"—Merchant Shipping Act*, 1894 (57 *& 58 Vict. c.* 60), *ss.* 158, 162.

The plaintiffs, two members of the crew of a

SHIPPING—*continued.*
steamship, subscribed their names to articles of agreement by which they undertook to serve on board the ship, in the capacities and at the wages therein mentioned, on a voyage from Southampton to New York, and/or, if required, to any port within the North Atlantic and South Atlantic Oceans, trading as may be required, until the ship returns to a final port of discharge in the United Kingdom for any period not exceeding twelve months, and should the vessel put back into port through accident, the crew to be transferred to any other vessel belonging to the same owners taking the place of the vessel named.

On the same day that the vessel left Southampton for New York she came into collision with another vessel, and was so seriously damaged in the hull that she was obliged to come to anchor, and the next day to return, under her own steam, to Southampton, where the crew, including the plaintiffs, were discharged with three days' pay, and her passenger and freeboard certificates having been, on demand, returned to the Board of Trade, the vessel was sufficiently patched up to enable her to proceed to Belfast, where she could be repaired, and, at the end of nine weeks, she received back the above-mentioned certificates enabling her to proceed to sea on the voyage from Southampton to New York.

The plaintiffs under s. 162 of the Merchant Shipping Act, 1894, claimed, in addition to the three days' wages earned by them, a further sum of one month's wages by way of compensation for the damage caused to them by being discharged otherwise than in accordance with the terms of the agreement, without fault on their part, and without their consent :—

Held by the Court of Appeal (Vaughan Williams L.J. and Buckley L.J., Kennedy L.J. dissenting), affirming the decision of Bargrave Deane J., dismissing the claim of the plaintiffs with costs, that, in the circumstances, by reason of the injury sustained by the vessel in the collision, she had ceased to be in a seaworthy condition to continue the adventure, so that, in respect of the voyage agreed upon, the case fell within the words of s. 158 of the above-mentioned Act, namely, that "by reason of the wreck . . . . of the ship" the service of the plaintiffs had terminated before the date contemplated by the agreement, and, therefore, the plaintiffs had been properly discharged with three days' pay.

Per Kennedy L.J. : The damage caused to the vessel by the collision delayed the voyage, but did not dissolve the contract with the crew, and, therefore, if the defendants, the owners of the ship, chose, for their own pecuniary advantage, to relieve themselves of the burden of that contract, they were liable, under s. 162 of the Act, to pay the compensation, not exceeding one month's wages, claimed by the plaintiffs. THE "OLYMPIC" (WAGES) - - - **C. A. 92**

SOUND SIGNALS—Collision—Sound signals for vessels in sight of one another—"Directing my course" - **166**
See SHIPPING 6.

SOUND SIGNALS—*continued.*
—— Ship—Collision—Steam vessel turning—Thames By-laws - - - - **149**
See SHIPPING. 7.

STATUTES :—

1534.

26 Hen. 8, c. 3—*First Fruits; Tenths* - **21**
See ECCLESIASTICAL LAW. 1.

1832.

2 & 3 Will. 4, c. cv., s. 24—*Local Act* - **1**
See SHIPPING. 1.

1857.

20 & 21 Vict. c. 85, s. 28—*Matrimonial Causes* **119**
See DIVORCE. 2.

1861.

24 Vict. c. 10, s. 6—*Admiralty Court* - **130**
See SHIPPING. 9.

1867.

30 & 31 Vict. c. 135—*Ecclesiastical Fees* **21**
See ECCLESIASTICAL LAW. 1.

1889.

52 & 53 Vict. c. 49, s. 4—*Arbitration* - **130**
See SHIPPING. 9.

1892.

55 & 56 Vict. c. 32, ss. 2, 12, 13—*Clergy Discipline* - - - - - - **184**
See ECCLESIASTICAL LAW. 2.

1893.

56 & 57 Vict. c. 63, s. 2—*Married Women's Property* - - - - - - **119**
See DIVORCE. 2.

1894.

57 & 58 Vict. c. 60, ss. 158, 162—*Merchant Shipping* - - - - - - **92**
See SHIPPING. 11.

1895.

58 & 59 Vict. c. 39—*Summary Jurisdiction (Married Women)* - - - **9**
See DIVORCE. 3.

1907.

7 Edw. 7, c. 12, s. 1—*Matrimonial Causes* **138**
See DIVORCE. 10.

—— —— s. 1, sub-s. 2 - - - - **138**
See DIVORCE. 11.

—— —— s. 3 - - - - - - - **119**
See DIVORCE. 2.

SUB-CHARTER — Ship — Collision — Damage—Time charter—Bailee—Claim for bill of lading freight - - - - **173**
See SHIPPING. 2.

—— Ship—Collision—Damage—Time charter—Loss of bill of lading freight - **54**
See SHIPPING. 3.

SUCTION — Ship — Collision — Overtaking or overtaken vessels — Crossing vessels — Suction or interaction—"Swerve" 214
See SHIPPING. 5.

SUMMARY JURISDICTION (MARRIED WOMEN) ACT, 1895 - - - 9
See DIVORCE. 3.

SURVIVORSHIP —Wills — Probate—Practice—Two persons dying together—Husband and wife—Wills—Probate, or administration with will annexed—Form of oath to lead grants - - - 6
See PROBATE.

"SWERVE"—Ship—Collision—Overtaking and overtaken vessels—Crossing vessels—Suction or interaction - - - 214
See SHIPPING. 5.

THAMES BY-LAWS, 1898, rr. 40, 42 - 149
See SHIPPING. 7.

THIRD PARTY—Shipping—Collision—Towage—Damage to cargo—Indemnity claimed from third party—Construction of contract—Implied term - - - 13
See SHIPPING. 8.

TIME—Shipping—Time charter—Sub-charter—Bailee—Claim for bill of lading freight
See SHIPPING. 2. 173

—— Shipping — Time charter — Sub-charter—Loss of bill of lading freight - 54
See SHIPPING. 3.

TOWAGE — Ship — Salvage—Abandoned vessel—Derelict—Quantum meruit—Conditions substituting salvage for towage
See SHIPPING. 10. 141

—— Shipping—Collision—Damage to cargo—Indemnity from third party—Construction of contract—Implied term - 13
See SHIPPING. 8.

VARIATION—Divorce—Variation of settlement.
See under DIVORCE.

WAGES—Seaman—"Wreck" - - - 92
See SHIPPING. 11.

WIFE—Husband and.
See HUSBAND AND WIFE.

WILL—Probate.
See under PROBATE.

WORDS—"Directing my course" - - 166
See SHIPPING. 6.

—— "Moderate" speed - - - - 70
See SHIPPING. 4.

—— "Opposite party" - - - - 119
See DIVORCE. 2.

—— "Stores" - - - - - - 1
See SHIPPING. 1.

—— "Swerve" - - - - - 214
See SHIPPING. 5.

—— "Wreck" - - - - - - 92
See SHIPPING. 11.

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